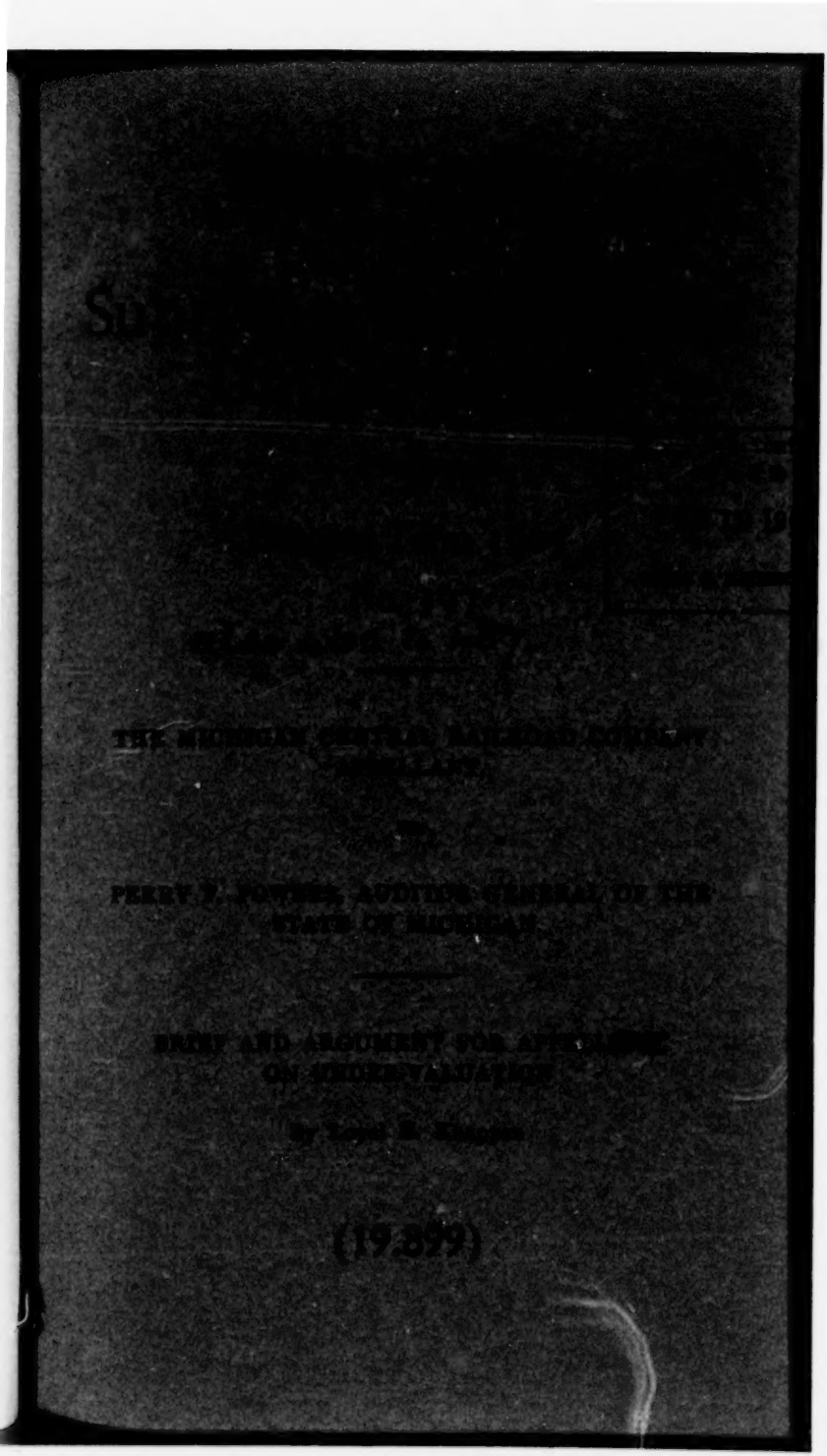

Supreme Court of the United States.

NO. 397.

(And Nos. 462-487 inclusive.)

THE MICHIGAN CENTRAL RAILROAD COMPANY,
Complainant and Appellant,

vs.

PERRY F. POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN,
Defendant and Appellee.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF AND ARGUMENT FOR DEFENDANT ON UNDER-VALUATION.

Statement.

This appeal involves the tax upon the appellant Railroad for the year 1902, assessed under the authority of the Michigan ad valorem law of 1901.

It is alleged in complainant's bill that the general properties of the state were under-valued for the purposes of the 1902 assessment in question, and that this under-valuation was intentional and in accordance with a practice prevailing generally among assessing officers throughout the state. The specific claim presented is that the true cash value of the general properties of the state was about $1,715,000,000, while the assessed valuation was but $1,418,251,858, or about 82.6 -|- per cent. of the true cash value of these properties; that the average rate of taxation thus assessed upon complainant's property under the ad valorem law of 1901 was, by such under-valuation of the general properties of the state, increased from what

would have been a rate of $13.68 -|- to $16.55 -|- upon each one thousand dollars of assessed valuation. (Bill of Complaint, Record, pp. 3-7.)

The only specification of errors relating to the subject of general property under-valuation is assignment number 12, namely:

> "The assessment of complainant's property, upon which is founded the tax involved in this suit, was made at the property's true cash value. The rate imposed upon the property of complainant by the proceedings in question in this cause was the average rate paid upon property in the state other than that taxed under said Act No. 173 of the Michigan Public Acts of 1901, upon which ad valorem taxes were assessed for state, county, school and municipal purposes. The evidence shows that such other property was uniformly, intentionally and generally assessed at the time in question, at not more than 82 -|- per cent. of its true cash value; and 17 -|- per cent. of the tax in question therefore should be set aside." (Record p. 858.)

The appellee denies the allegation that the general properties of the state were, in fact, substantially and generally under-valued, and (if any under-valuation be found to have existed in 1902) denies that such under-valuation was fraudulent, or in pursuance of any rule or system of intentional under-valuation adopted by assessing officers generally in Michigan.

The appellee further insists, by answer and proofs, that the assessment of the Michigan portion of the appellant's railroad property by the State Board of Assessors for 1902 was not only greatly below its real value, but that such under-valuation was even greater than the alleged under-valuation of the general properties of the state. The appellee also insists that such under-valuation of appellant's railroad prop-

erty was intentionally made. (Defendant's Answer, Record pp. 39 and 57.)

The Michigan Tax Commission (which has general supervision and control over all assessments of general property) was organized in 1899. The valuations of the general properties of the state from 1899 to 1903, as assessed and reviewed, were as follows:

For 1899	$ 968,189,087
For 1900	1,317,450,028
For 1901	1,328,632,691
For 1902	1,418,251,858
For 1903	1,537,849,903

(Record, pp. 355, 61, 119.)

The first assessment of railroad property for taxation under the Michigan ad valorem law of 1901 was made by the State Board of Assessors in 1902. The values of the Michigan portion of appellant's railroad property for the years 1902 and 1903, respectively, as so assessed by the State Board of Assessors, were as follows:

For 1902	$45,000,000
For 1903	55,500,000

(Record, p. 816.)

If it shall be determined that there was no such under-valuation of the general properties of the state in 1902 as to entitle complainant to relief on account thereof, the question of the under-valuation of the railroad properties for that year is immaterial. If, however, appellant should be held entitled to consideration on account of an under-valuation of the general properties, the question of the under-valuation of appellant's property does become material for the purpose of determining whether appellant has been, in fact, injured, and for the purpose of determining the tax which appellant shall be required to pay as a condition of relief.

The District Judge found that there was no evidence of

any general or uniform fraudulent under-assessment of the general properties of the state, and accordingly did not enter upon a determination of the question of the under-valuation of appellant's railroad property. (Record, pp. 853-4.)

At the end of this brief is an index to the Transcript of Record with reference to witnesses and exhibits, (so far as they pertain to the subjects treated herein), classified by subjects and parties.

Note:—The references to the Transcript of Record, contained in this brief, are to the "print page."

Outline of the Argument.

I.

UNDER-VALUATION OF THE GENERAL PROPERTIES OF THE STATE.

GENERAL PROPOSITION.

No such under-valuation of the general properties of the state for the year 1902 is shown by the evidence as can entitle appellant to relief.

Argument, p. 14.

THE RULE OF LAW GOVERNING THE SUBJECT.

To entitle appellant to relief it must appear that the average rate of taxation assessed upon the general property of the state was wrongfully increased to appellant's detriment, by an intentional, fraudulent, general and substantial under-valuation of the general properties of the state.

Argument, p. 14.

State Railroad Tax Cases, 92 U. S. 612.
Cummings vs. Nat'l Bank, 101 U. S. 153, 155.
Nat'l Bank vs. Kimball, 103 U. S. 735.
Supervisors vs. Stanley, 105 U. S. 305, 318.
Stanley vs. Supervisors, 121 U. S. 548.
Bank vs. Perea, 147 U. S. 87.
New York State vs. Barker, 179 U. S. 279, 284.
Coulter vs. L. & N. Ry. Co., 25 Sup. Ct. Rep. 342.

THE EVIDENCE OF GENERAL PROPERTY UNDERVALUATION.

The evidence in the case fails to show that there was any substantial under-valuation of the general properties of the state in the 1902 assessment. The evidence fails to show that such under-valuation as may have existed in some cases or in some localities was fraudulent and intentional, or that it was general and the result of concerted action on the part of assessing officers.

Argument, p. 18.

FIRST.

There was no substantial under-valuation of the general properties of the state in the year 1902.

Argument, p. 19.

1. **Organization and powers of the Tax Commission, and general history of the movement for equal taxation.**

Argument, p. 19.

a. Gov. Pingree's assumption that the general properties of the state were assessed in 1899 on a 65 per cent. basis, was largely guess-work.

Argument, p. 22.

b. Such assumption was not an adjudication by the Governor of the existence of such under-valuation.

Argument, p. 22.

2. **The actual and admitted results of the efforts of the Tax Commissioners to bring assessments to cash value, urgently pushed for more than three years before the 1902 assessment was completed, of itself strongly discredits the claim of a substantial and general property under-valuation in 1902.**

Argument, p. 28.

a. **The property of the state generally had been brought to substantial cash value by 1901.**

Argument, p. 30.

3. **The evidence presented by appellant utterly fails to overthrow the presumption of the legality of the official valuations of the assessing officers made under this close supervision of the Tax Commission, and to sustain the burden of proof that property generally was substantially under-valued in the 1902 assessment.**

Argument, p. 33.

a. The evidence relied on by appellant to sustain this burden is of four kinds: (1) The estimates of field men com-

pared with actual assessments of supervisors; (2) the Tax Commissioners' 1901 estimate of the value of the general properties of the state as compared with the actual assessments for that year; (3) the equalized valuation of the general properties of the state as adopted by the State Board of Equalization in 1901; (4) the commission's estimate of actual values in 1902.

Argument, p. 33.

(1.) **The work of the field examiners both in 1901 and 1902 was wholly unreliable and furnished a less safe estimate of values than the assessments made by the assessing officers.**

Argument, p. 34.

(a) The field men's estimates were unsatisfactory to themselves.

Argument, p. 40.

(b) They were equally unsatisfactory to the Tax Commissioners.

Argument, p. 41.

(c) Differences of more than 100 per cent. in the relations between assessed value and estimated value result by including a larger instead of a smaller number of pieces in the comparison.

Argument, p. 41.

(d) Yet the value of an entire township was estimated as if the same conditions of relative inequality prevailed throughout the township.

Argument, p. 42.

(2.) **The 1901 estimate of the Tax Commissioners as presented to the State Board of Equalization was not only based upon the unreliable and discredited reports of the field men, but was shown by the subsequent experience of the Commissioners themselves to have been grossly extravagant and wholly unreliable.**

Argument, p. 43.

(a) This 1901 estimate was not an adjudication.

Argument, p. 43.

(b) This 1901 estimate has since been expressly discredited by the Commissioners, and the field examiners' reports likewise repudiated.

Argument, p. 45.

(3.) **The equalized valuations adopted by the State Board of Equalization in 1901 do not tend to show an aggregate under-assessment of the general properties of the state in 1902.**

Argument, p. 47.

(a) The State Board's equalization was not an adjudication of values.

Argument, p. 48.

(b) The report of the State Board of Equalization was not competent evidence to prove under-valuation.

Argument, p. 50.

(4.) **The estimate made by the State Board of Assessors of the value of the general properties of the state in 1902 does not prove an under-valuation of those properties in the year in question.**

Argument, p. 50.

(a) The 1902 estimate was not a legal adjudication of actual values.

Argument, p. 50.

(b) The 1902 estimate was without substantial basis and was largely pure guess.

Argument, p. 54.

(c) The field examinations of 1902, even if credited, show no system of under-valuation then existing.

Argument, p. 58.

b. The evidence of under-valuation is confined to the testimony of Tax Commissioners and field examiners.

Argument, p. 63.

c. This evidence is incompetent. Argument, p. 63.

There is nothing in the record reasonably tending to overthrow the presumption of correctness attending the official assessments of the supervisors. It follows that the assessments made by the assessing officers in 1902 represented the cash value of the general properties of the state as nearly as it is practicable to obtain it, and that the claim of substantial under-valuation of the general properties of the state in 1902 is unsustained.

SECOND.

Even should an aggregate under-valuation of the general properties of the state be found to have existed in 1902, such under-valuation was not fraudulent or intentional, nor was it the result of a concerted rule of conduct. Argument, p. 64.

THIRD.

Whatever general property under-valuation may have existed in 1902 was sporadic and not general throughout the state. Argument, p. 70.

THE ADJUDICATED CASES.

1. In the cases in which relief has been granted on account of under-valuation of other property, the facts bear no reasonable relation to those in this case. Argument, p. 70.

2. In numerous cases where evidence of unjust discrimination was much greater than here, relief has been denied. Argument, p. 75.

II.

UNDER-VALUATION OF APPELLANT'S RAILROAD PROPERTIES.

Appellant's railroad property was substantially undervalued by the State Board of Assessors in the 1902 assessment

thereof. This under-valuation was greater than the claimed general property under-valuation.

FIRST.

The Rule of Evidence.

It was competent for the defendant to show that appellant's railroad property was under-assessed by the State Board of Assessors in 1902 without proving that such under-valuation was fraudulent and intentional. Prejudicial discrimination is the basis of right to relief, and the burden of proving the same is on complainant.

Argument, p. 82.

Pelton vs. Nat'l Bank, 101 U. S. 143.

Cummings vs. Nat'l Bank, 101 U. S. 153.

1st Nat. Bank vs. Lucas County, 25 Fed. 749.

Taylor vs. L. & N. Ry. Co., 31 C. C. A. 537.

Chicago Union Trac. Co. vs. B'd of Equalization, 114 Fed. 557.

Ry. Co. vs. Coulter, 131 Fed. 282.

Coulter vs. Ry. Co., 25 Sup. Ct. Rep. 342.

Bureau County vs. R. R. Co., 44 Ill. 229.

R. R. Co. vs. Commissioners, 54 Kas. 781.

Randall vs. Bridgeport, 63 Conn. 321.

Ex parte Bridge Co., 62 Ark. 461.

Bank vs. Miller, 19 Fed. 372.

Louisville Trust Co. vs. Stone, 107 Fed. 305.

Keokuk Bridge Co. vs. Ill., 161 Ill. 514.

Alexander vs. Thomas, 70 Miss. 517.

Wagoner vs. Loomis, 37 Ohio St., 571, 582.

Louisville Ry. Co. vs. Commonwealth, 49 S. W. 486.

State vs. West. Union Tel. Co., 165 Mo. 502.

Southern Ry. Co. vs. N. Carolina Corp. Com., 104 Fed. 700.

Railroad & Telephone Cos. vs. B'd of Equalizers, 85 Fed. 302.

Judson on Taxation, Sec. 463, p. 609.
Williams vs. Mears, 61 Mich. 87.
Canfield vs. Bayfield Co., 74 Wis. 60.
Mercantile Nat. Bank vs. Hubbard, 98 Fed. 465, 469.
Cooley on Taxation (3rd Ed.), 1443, and cases cited.
Cooley on Taxation (3rd Ed.), 751, 752.
Muskegon vs. Boyce, 123 Mich. 540.
Moss vs. Cummings, 44 Mich. 361.
State vs. Thayer, 69 Minn. 170, 174.
People vs. Van Nostrand, 24 N. Y. Suppl. 513.

SECOND.

The assessments of appellant's railroad property did not in fact represent the good faith judgment of the State Board of Assessors.

Argument, p. 92.

THIRD.

Appellant's railroad property was in fact substantially under-valued in the 1902 assessment.

Argument, p. 100.

1. **The general condition of the Michigan Central system.**

Argument, p. 100.

a. Of what the system consists and the Michigan proportion thereof.

Argument, p. 100.

b. The physical valuation and a comparison between that valuation and bond values.

Argument, p. 101.

c. The market value of Michigan Central stock.

Argument, p. 103.

d. Appellant's prosperity as compared with railroads generally.

Argument, p. 105.

e. Appellant's traffic has steadily increased for many years.

Argument, p. 105.

f. Net earnings as reported.

Argument, p. 105.

g. Practice of paying for improvements from operating expense.

Argument, p. 106.

h. Appellant's operating expense ratio as affected by charging additions and betterments thereto.

Argument, p. 107.

i. Dividends paid by appellant.

Argument, p. 109.

j. Net returns to stock and bond investors.

Argument, p. 110.

2. **The appraisal of the railroad as a unit including both physical and non-physical values and the apportionment thereof upon a track mileage basis, is proper.**

Argument, p. 111.

Adams Express Co. vs. Ohio, 165 U. S. 194.

Am. Ex. Co. vs. Indiana, 165 U. S. 255.

Adams Exp. Co. vs. Ohio, 166 U. S. 185.

Gulf, etc. Ry. Co. vs. Hewes, 183 U. S. 66.

Pullman Palace Car Co. vs. Penna., 141 U. S. 18.

Maine vs. G. T. Ry. Co., 142 U. S. 217.

New Orleans Ry. Co. vs. New Orleans, 143 U. S. 192.

Taylor vs. Secor (State R. R. Tax Cases), 92 U. S. 575.

P. A. Mich. 1901, p. 238, Sec. 5.

Adams Express Co. vs. Ohio State Auditor, 166 U. S. 185.

P. A. Mich, p. 242, Sec. 8.

3. **The taking of franchise values into account in determining the assessed valuations of railroad properties under the Michigan ad valorem tax law does not create lack of uniformity of taxation nor does it put railroad properties on a different basis than property generally in the state. Franchise values,**

where found to exist, are equally taxable under the general statute and under the railroad ad valorem tax law.

Argument, p. 114.

a. Both railroad property and general properties are required by statute to be assessed on the same basis, namely, true cash value. Argument, p. 114.

C. L. Mich. 1897, Secs. 3847 and 3850.
Citizens St. Ry. Co. vs. Common Council, 125 Mich. 682.

b. Appellant's franchise was not separately valued, but such separate valuation would not be invalid.

Argument, p. 117.

4. **The methods of valuation employed have received the approval of the courts as furnishing a safe guide for the purpose of determining values for taxation.** Argument, p. 122.

Col. So. Ry. Co. vs. Wright, 151 U. S. 470.
Ry. Co. vs. Backus, 154 U. S. 424, 431.
People vs. Hicks, 40 Hun, 598.
People vs. Assessors, 2 N. Y. S. 240.
People vs. Reid, 64 Hun, 553.
People vs. Kalbfleish, 49 N. Y. S. 546.
West. U. Tel. Co. vs. Taggart, 163 U. S. 1, 21
Bridge Co. vs. Ky., 166 U. S. 150.
Taylor vs. R. R. Co., 88 Fed. 350. (C. C. A. 6th Cir.)
Chicago U. Trac. Co. vs. St. B'd., 112 Fed. 607.
Porter vs. R. R. Co., 76 Ill. 561, 589.
B'd of Equalization vs. People, 191 Ill. 528.
State vs. Savage (Neb.), 91 N. W. 717.
Sanford vs. Poe, 69 Fed. 546. (C. C. A. 6th Cir.)

5. **The basis on which the computations of value of appellant's railroad properties were made by the different methods, and their results.**

Argument, p. 132.

Argument.

I.

UNDER-VALUATION OF GENERAL PROPERTIES.

No such under-valuation of the general properties of the state for the year 1902 is shown by the evidence as can entitle appellant to relief.

THE RULE OF LAW.

To entitle appellant to relief it must appear that the average rate of taxation assessed upon the general property of the state was wrongfully increased, to appellant's detriment, by an intentional, fraudulent, general and substantial under-valuation of the general properties of the state. The burden of so proving is upon appellant.

It is well settled that the mere fact that a portion of the property on a given roll or subject to a given tax, is under-valued or even omitted entirely from the assessment roll, will not invalidate the tax upon other property on the same roll and thus injuriously affected by such under-valuation or omission, nor will it even entitle the complaining party to a reduction of his tax.

The rule is now thoroughly settled, not only in Michigan and in the state courts generally, but by the decisions of this Court, that an under-valuation of property, in order to constitute an unlawful discrimination entitling the injured party to relief, must be not only intentional, purposeful and fraudulent, but it must be something more than sporadic or occasional. It must be not only **habitual** and to such an extent as to create a **"rule of conduct,"** but this rule of conduct must be one of general adoption. More than this, the under-valuation must be substantial and well defined, as well as clearly proven.

State R. R. Tax Cases, 92 U. S. at p. 612.
Cummings vs. Nat. Bank, 101 U. S. 153, 155.
Nat'l Bank vs. Kimball, 103 U. S. 735.
Supervisors vs. Stanley, 105 U. S. 305, 318.

Stanley vs. Supervisors, 121 U. S. 548.
Bank vs. Perea, 147 U. S. 87.
New York State vs. Barker, 179 U. S. 279, 284.
Coulter vs. L. & N. R. R. Co., 125 Sup. Ct. Rep. 342.
Merrill vs. Humphrey, 24 Mich. 170.
Walsh vs. King, 74 Mich. 350.
Solomon vs. Oscoda Township, 77 Mich. 365.
Auditor General vs. Prescott, 94 Mich. 190.
Auditor Gen'l vs. Improvement Co., 129 Mich. 189.

As was said by this Court in **State Railroad Tax Cases,** (supra) at page 612:

> "Perfect equality and perfect uniformity of taxation as regards individuals or corporations or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state * * * the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

And again, as was said by this Court in **Stanley vs. Supervisors,** at page 550:

> "Absolute equality and uniformity are seldom, if ever attainable. The diversity of human judgments and the uncertainty attending all human evidence preclude the possibility of this attainment. Intelli-

gent men differ as to the value of even the most common objects before them—of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with when designed and manifest departures from the rule are avoided."

In **New York State vs. Barker** (supra) where an assessment of corporate property was attacked upon the ground of under-valuation of other properties upon the same roll, in violation of a statute requiring the corporate property to be taxed in the same manner as the other personal and real estate of the county, this Court said:

> "To raise the question which the plaintiff in error seeks, it was therefore obviously necessary to prove as a fact that there was **habitual** violation of law by under-valuation; that, in the language of Mr. Justice Miller, in Supervisors vs. Stanley, 105 U. S. 305, 318, the assessors 'habitually and intentionally, or by some rule prescribed by themselves, or by someone whom they were bound to obey,' under-valued real estate for assessment in New York City; or, as stated in Cummings vs. National Bank, 101 U. S. 153, 155, that **a rule or system of valuation** had been adopted by those whose duty it was to make the assessment which was **designed to operate unequally**, and to violate a fundamental principle of the construction, and that such rule had been applied not solely to one individual, but to a **large class** of individuals or corporations."

The case of **Dundee Mtge. etc. Co. vs. Parrish, 24 Fed. 197,** is authority only for the proposition that concert of action can be inferred from the prevalence of the same practice in a

number of counties in various parts of the state. It relates only to the sufficiency of the proof, not to the necessity of the existence of the fact.

In **Stanley vs. Supervisors** (supra) where complaint was made of under-valuation of other properties affected by the same taxation, it was said by this Court, (at page 548):

> "To recover in this case the plaintiff was required to prove under the decision when the case was first here (Supervisors vs. Stanley, 105 U. S. 305) that 'the assessors habitually and intentionally, or by some rule prescribed by themselves or by someone whom they were bound to obey' assessed the shares of the national banks higher in proportion to their actual value than **other** moneyed capital generally."

In **Bank vs. Perea** (supra) a law of New Mexico required property to be assessed at its cash value. The plaintiff's property was originally assessed at its full value, while the other property was assessed at 70 per cent. The bank applied to the board of equalization, which reduced it assessment to 85 per cent. This Court, speaking through Mr. Justice Brewer, said:

> "Surely upon the mere fact that other property happened to be assessed at 30 per cent. below the value, when this did not come from any design or **systematic effort** on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation, etc., it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way."

In **Coulter vs. L. & N. R. R. Co.** (supra) where the railroad company claimed that general property was under-valued and the rate of taxation on appellee's railroad property thereby wrongfully increased, this Court said:

> "It is not contended that a mere under-valuation would be enough. It is admitted that it must have been systematic and intentional."

The case of **Cummings vs. Nat'l Bank** (supra) is not authority for the proposition that courts will take judicial notice of the existence of a practice of under-assessments.

In **New York vs. Barker** (supra) at page 286, this Court directly held to the contrary of this proposition, saying:

> "This Court did not presume a violation of duty in Cummings vs. Nat'l Bank (supra). On the contrary, the bill alleged the facts and the testimony supported the allegations. In extenuation of the practice alleged and proved the Court remarked in passing (p. 162) that it was not limited to the state of Ohio and that it was matter of common observation that in the valuation of real estate the rule was habitually disregarded. Although the Justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the Court took judicial notice thereof, but only those facts which had been pleaded and testimony to sustain which had been duly given, formed the basis of judicial action. We will not, and ought not, to presume a violation in the absence of allegations and proofs to that effect."

We submit that the decisions to which we have referred conclusively establish the rule as stated above in this brief.

THE EVIDENCE OF GENERAL PROPERTY UNDER-VALUATION.

We insist that the evidence in the case fails to show that there was any substantial under-valuation of the general properties of the state contained in the 1902 assessment. We also insist that the evidence utterly fails to show that such under-valuation as may have exised in some cases, or in some localities was fraudulent and intentional, or that it was general and

the result of concerted action on the part of assessing officers.

The discussion of the facts involves three questions:

1. Was there substantial under-valuation in the 1902 assessment of the general properties of the state, and if so, what was the extent of that under-valuation?

2. If such under-valuation is found to have existed, was it fraudulent, intentional, and the result of a concerted rule of conduct?

3. In case the aggregate assessment of the general properties of the state is clearly shown to be substantially below the actual aggregate value thereof, and in case there is found to have been in given instances or localities, intentional and fraudulent under-valuation, was that condition general throughout the state?

Unless all three of these questions can be answered in the affirmative, it is clear that the appellant has no ground of complaint upon the score of alleged general property under-valuation. We submit that it is clear upon this record that these questions cannot be so answered.

FIRST.

THERE WAS NO SUBSTANTIAL UNDER-VALUATION OF THE GENERAL PROPERTIES OF THE STATE IN THE YEAR 1902.

The inquiry upon this branch, as upon the other two branches of the subject, relates directly and solely to the conditions affecting the assessment of 1902. Were it conceded that there was a substantial under-valuation for previous years, an under-valuation in 1902 by no means follows. On the contrary, the history of the movement for equal taxation, including the history of the organization, and workings of, and results accomplished by the Tax Commission from 1899 to 1902 effectually disprove the allegation that substantial under-valuation existed in the last named year.

1. **Organization and Powers of the Commission, and General History of the Movement for Equal Taxation.**

The State Tax Commission was organized in 1899.

P. A. Mich. 1899, No. 154, p. 227; R. p. 337 and following.

The object of the Act, as stated in its title, was to provide "for the creation of a board of state tax commissioners, charged with the duty of enforcing this Act (the general tax law), and exercising supervisory control over officers administering the general tax laws of this state, and reporting to the Legislature thereon, and empowered in certain cases to **review assessment rolls and correct the same, or add thereto,** and to provide for the **assessment and taxation of property omitted from the assessment rolls.**"

The duties of the Commissioners were, in general, "to take such measures as will **secure the enforcement** of the provisions of this Act, to the end that **all the properties** of this state liable to assessment for taxation shall be **placed upon the assessment rolls and assessed at their actual cash value.**" (Sec. 149, p. 230.)

For the purpose of securing this result it was made the duty of the Commissioners to confer with, and advise assessing officers as to their duties under the Act, and to institute proper proceedings to enforce the penalties and liabilities provided by law against public officers, officers of corporations, and individuals, failing to comply with the Act, and to prefer charges to the Governor against assessing and taxing officers who violate the law or fail to perform their duty with reference to assessment and taxation, with power to call upon the Attorney General and any prosecuting attorney in the state for assistance. (Sec. 150, Subd. 2, p. 230.)

The Commissioners were also empowered to receive complaints and make investigation regarding fraudulent or improper assessments "and to take such proceedings as will **correct the irregularity** complained of if found to exist." The Act also required that every county in the state be visited by

at least one commissioner as often as once each year, for the purpose of hearing complaints, collecting information regarding the workings of the law, compelling compliance with the law, punishing violations thereof, and making proper suggestions as to amendments and changes. (Sec. 150, Subd. 3 and 4, p. 231.)

The Commissioners were also authorized to require from any officer in the state, upon prescribed forms, such reports as the Commissioners might determine would assist in ascertaining assessed valuations and equalized valuations of all taxable property throughout the state "to the end that it may have complete and statistical information as to the practical operation of the Act." (Sec. 150, Subd. 5, p. 231.)

By this Act the State Tax Commissioners were given powers not then enjoyed by **any other commission anywhere in the United States,** namely, original jurisdiction over the acts of all assessing officers, including power to correct all improper or illegal **assessments,** to **add new property to the rolls,** and even to make **entirely new assessment rolls.**

1902 Report of State Tax Commission, p. 17;
Transcript of Record, p. 341.

It will thus be seen that the powers conferred upon the Michigan Tax Commissioners **as early as 1899** were as complete and sweeping as could well be conferred.

Law declared constitutional. This Act was declared constitutional June 19, 1900, and the validity of the important and sweeping provisions above enumerated, fully sustained.

Tax Com'nrs. vs. Assessors, 124 Mich. 491.
Tax Com'nrs. vs. Quinn, 125 Mich. 128.

Membership of the Commission. The Commission was organized July 1, 1889. Its original members were Messrs. Campbell, Freeman and Oakman. Mr. McLaughlin afterwards took Mr. Campbell's place. Messrs. Jenks and Sayre were added later. Mr. Dust took Mr. Oakman's place, and

Mr. Kerr took Mr. Jenks' place in 1901. (Twiss' Test., R. p. 60.)

a. **The assumption that the general properties of the state were assessed in 1899 at but 65 per cent. of value, was largely guess-work.**

The Commission began its work and prosecuted it throughout upon the assumption contained in the message of Governor Pingree to the Legislature in 1899, that the general properties of the state were assessed on an average at but 65 per cent. of their actual value.

Gov. Pingree's Mess. to Spec. Sess. of Legis., Oct. 10-15, 1900.

Transcript of Record, pp. 235-6.

This assumption was largely guess-work. It is not claimed to have been based upon a critical or official investigation. In view of the conditions under which it was made, it would be unreasonable to expect the estimate to err in the direction of conservatism.

b. **This assumption of a 65 per cent. assessment of general property was not an adjudication by the Governor of the existence of such specific undervaluation.**

An adjudication necessarily implies a duty or authority to finally determine the question with respect to which the adjudication is asserted. The Governor was not charged with the duty of determining the true value of the taxable property of the state. It is sufficient to say that the Governor utterly disclaimed any knowledge upon, or investigation of the subject. He expressly says: "In these comparisons I use 65 per cent. of the full cash value, because that is the average of assessments throughout the state, according to a computation made by a member of the State Board of Tax Commissioners."

Mich. House Journal, Extra Sess. Oct. 10-15, 1900, p. 14.

It is not claimed that any member of the State Tax Com-

mission has made any computations or investigations justifying the adoption of 65 per cent. as the measure of undervaluation in 1899.

It was also suggested in argument that Prof. Adams adopted 65 per cent. as the ratio of assessed value to actual value of the general properties, in his report of the value of the Railroad properties in 1900, but Prof. Adams expressly says that he simply assumed that relation and that such assumption did not involve a determination of the value of the general property, or that it was in fact under-valued. (R. pp. 526-7, 817-18.)

Nor could any report of the Tax Commission to that session of the Legislature have been such an adjudication. The Tax Commission was not charged, so far as the session in question is concerned, with the duty to report on the value of the general properties in the state. The Tax Commission is required to report to the Legislature "at the beginning of the regular sessions" thereof, the true valuation of the general properties of the state and the rate of taxation the same are paying. (P. A. Mich. 1899, p. 232, subd. 9.) The session to which the Governor's message in question was sent was not a regular session (which is required to be held in January of each odd numbered year (Mich. Const., Art. IV, Sec. 33), but a special session held October 10th to 15th, 1900 (Tr. of Rec., p. 235.) But not only had the Commission no authority to make such report, it in fact did not attempt to do so. (Mich. House Journal, Extra Sess. Oct. 10 to 15, 1900.)

The Tax Commission thus from the start assumed the attitude of having a mission to bring the assessed valuation up to this assumed actual valuation as speedily as possible. It is conceded by the Commissioners that they have never lost sight of this mission. This fact is important in considering both the effectiveness of the Commission's work and the weight to be given the views of its members as to the situation

exising in 1902. The partisan conduct of Commissioners Freeman and Sayre in their assessments of appellant's railroad properties and in voluntarily making affidavits in support of appellant's application for an injunction against the officers of the state they were representing will be hereafter referred to.

The 1899 valuation. The assessed valuation of the general properties of the state for 1899 was $968,189,087. If Gov. Pingree's radical estimate were to be adopted, it would mean that the correct valuation would be $1,483,369,167. The results of the work of the Commission throughout have shown not only the extravagance of this general and primary assumption, but the equally great extravagance of the specific opinions and estimates of the controlling spirits upon the Commission as promulgated from time to time.

It may be suggested by appellant's counsel that it was the assessment of 1900 (rather than 1899) which Gov. Pingree assumed was but 65 per cent. of actual value. Such suggestion can only be based upon the fact that Gov. Pingree made reference in the report to the 1900 railroad valuations, and that the 1900 general property assessments had been made when the message in question was written, and so must have been in his mind.

This suggestion is clearly overthrown by the fact that the average rate of taxation in the state for the year referred to in the Governor's Message was given as 2½ per cent., while the average tax rate for 1900 was a trifle more than 1½ per cent. ($15.4697 per M.), while that for 1899 was 2.11 per cent. ($21.1653 per M.). The 1899 general property assessment was thus clearly the one he had in mind. (Tax Com. Rept. for 1900, p. 79, and Tables No. 86 and 87 therein.)

The means employed by the Commission. The year 1899. Mr. Freeman, the most active member of the Commission (and the only member who has served continuously since its organization) testified that during the first year (1899) the Com-

missioners traveled over the state quite extensively, covering the Upper Peninsula and twelve or fifteen counties in the Lower Peninsula, visiting and addressing as many boards of supervisors as possible during their sessions, and talking with each assessing officer personally in the counties so visited—all the time carrying on a campaign of education, instructing assessors constantly as to the meaning of the law and **their duty under it to assess all property at cash value.**

Freeman's Test., R. pp. 106-9.

Tax Com'nrs Rept. for 1902, p. 17; R. 340.

This same year the preparation of the comparative table of assessments and sale valuations covering the entire of the state, was begun by the Commission The registers of deeds in every county were required to furnish a list of descriptions sold during the year, together with the consideration named in the deeds of conveyance. The county treasurers were required to furnish a statement of the assessed valuation of the properties so shown in the reports of the registers of deeds. This comparative schedule was completed in the early spring of 1900.

Freeman's Test., R. 109.

Twiss' Test., R. 59.

The year 1900. In this second year the work of visiting of the assessors was continued, special attention being paid to **conferences with individual assessors.**

The comparative tables of sale considerations and assessed valuations being accessible, comparisons were readily made between two classes of valuations. While there were no general reviews of the rolls of entire assessing districts in 1900 (except in St. Ignace and Mackinac Island), special reviews were had in connection with the conferences with individual assessors, and the campaign of education was actively carried on.

Twiss' Test., R. 67.

Freeman's Test., R. 111.

The time of the Commission was "fully occupied in special reviews where properties of great value were omitted from the roll or grossly over-valued, or where it seemed advisable, on account of the character, extent and value of property involved, to consider it carefully and establish a standard for the future guidance of assessing officers." This condition existed up to 1902.

Tax Com'nrs. Report for 1902, p. 22; R. p. 343.

With the view of bringing up the assessments to substantial cash value as speedily as possible, the **first reviews** were had **in the counties lowest assessed.**

Twiss' Test., R. 66, 67.

Sayre's Test., R. 149.

The Commissioners testified, not only without division, but without dispute, that the supervisors as a rule, **showed from the start, a willingness to comply with the law.** (Dust's Test., R. 75.)

The report of the Tax Commissioners to the Governor is to the same effect, and adds that "The supervisors showed an active and intelligent interest in the subject and expressed a desire for a better knowledge of the law relating to their work, and manifested a willingness to be governed by it."

Tax Com'nrs. Rept. for 1901 and 1902, p. 16; R. 340.

It is also the undisputed testimony of the Commissioners that **they raised property to actual value** whenever they found it below. (Twiss' Test., R. 65-66; Sayre's Test., R. 148.)

The marked effect of the work of 1899 and 1900, is seen in the fact that while in the latter year charges were preferred to the Governor against assessors for non-assessment, four officers being removed (all in the one county of Roscommon, which confessedly was at cash value by 1901—R. 61) it was **never afterwards necessary to make any charges whatever anywhere.** (Twiss' Test., R. p. 69.)

The net result of the work of the Commission in 1899 and

1900 was that the assessed valuation of the general properties of the state was increased from $968,189,087 in 1899 to $1,317,450,028 in 1900, **an increase of more than 349 million dollars,** and an increase of 36 per cent. above the assumed 65 per cent. valuation of 1899. The average tax rate was, by this increase in assessed valuation, reduced from $21.165 to $15.469 per one thousand dollars of valuation. (Tax Com'nrs 1900 Rept., p. 79, and Tables 86 and 87 accompanying.)

The year 1901. Field examinations. This year the Commission entered upon a system of so-called "field examinations," by which men employed by the Commission were sent over the state to inspect and estimate the values of the property of which sales records had been obtained from the registers of deeds previous to the spring of 1900, and later of a class of property known as "pick-ups," being parcels selected at random by the field men, the **assessed valuation** of such properties, both sales and pick-ups, being compared with the **estimated** valuations made by the field men as a basis for a determination by the Commission of the relation between the assessed valuations and actual values of the **entire districts** in which such comparisons of **individual** assessments and individual **estimates** were so made.

This system was kept up during 1902 as well. During 1901 and 1902 numerous general and special reviews were held, the **state being practically covered by such reviews.**

In 1901 the State Board of Equalization met and the Commissioners conceived it their duty to furnish that Board information which should enable it to make not only a relatively uniform valuation between the various counties, but to determine the actual cash value of the properties of the state. Accordingly, the Commission, acting largely on the reports of the field men, presented to the Board of Equalization estimates as to the value of the general properties of the state. The valuations placed by the assessing officers upon the general

properties of that year (1901) had aggregated $1,328,632,691. The Tax Commissioners in their report to the Board of Equalization, **estimated** the values of these general properties at $1,702,471,014. The equalized valuations of the various counties as adopted by the State Board of Equalization, aggregated $1,578,100,000.

It is expressly admitted that there is no evidence that the State Board of Equalization attempted to determine actual values. (R. 288.)

In 1902 the assessed valuation of the general properties of the state was $1,418,251,858.

The estimated value placed by the State Board of Assessors upon the general properties of the state for that year, for the purpose of determining the average rate of taxation to be assessed by the State Board of Assessors upon railroad property was $1,715,000,000.

The Supreme Court of Michigan held that the State Board of Assessors had no jurisdiction or authority to make the estimate in question.

B'd of Education of Detroit vs. St. B'd of Assessors, 133 Mich. 116.

It is upon the relation between the illegal 1715 million **estimate** of the State Board of Assessors, and the 1418 million aggregate valuation of the **official assessments made by the assessing officers,** that the allegation is now made by complainants that the assessment for 1902 was but 82.4 per cent. of the real value of the general properties of the state. The record clearly shows that no reliance can be placed on this comparison.

2. **Results of the Work of the Tax Commission Before the 1902 Assessment.**

The actual and admitted results of the efforts of the Tax Commissioners to bring assessments to cash value, urgently pushed for more than three years before the 1902 assess-

ment was completed, of itself strongly discredits the claim of a substantial and general property under-valuation in 1902.

As already shown, from the organization of the Commission in 1899, both boards of supervisors collectively, and assessors individually, were constantly instructed by the Commissioners to assess at cash value, and the testimony is express and uncontradicted that the supervisors from the start showed a willingness to comply with the law; that the county boards of equalization usually followed the recommendations of the Tax Commission; that the counties lowest assessed were first reviewed by the Commissioners; that the latter raised assessments to cash value whenever they found them below, and that the influence of the Commission extended even beyond its actual work. (Bolt's Test., R. 194.) It is the testimony generally of the Commissioners that the assessments grew steadily better from the start. (Dust's Test., R. 70; Sayre's Test., R. 148; McLaughlin's Test., R. 102.)

But we are not left to general statements of the increases brought about and the actual condition in 1902.

Commissioner Freeman testifies that the Lower Peninsula was **nearly covered** in 1901, and the Upper Peninsula **largely** covered. (R. p. 129.)

The 1902 report of the Tax Commission shows that reviews had been had in practically all the counties of the state and in all the principal cities. (R. pp. 343-5.)

Commissioner Sayre, who is one of the Commissioners who made the affidavit in support of complainant's bill in this case, not only testified that there was a general raise in a portion, or the entire of all the counties of the state before 1902, but also enumerates thirty counties in which special reviews were had in the year 1901, and sixteen counties in which reviews, partly general and partly special, were had in 1902, and says that at all general reviews the entire county was brought up to cash value. The object of the special reviews

was to bring to cash value the parts so reviewed, which were the parts considered the lowest assessed. Such property was of course brought to cash value. (R. pp. 148, 149.)

Efforts were made in several special directions for the increase of assessments. The estates of deceased persons were carefully looked after. (R. p. 339.)

Assessors had been in the habit of assessing credits at their face value. They were taught by the Commissioners to assess them at their real value.

1902 Report Tax Commission; R. 340.

The values of timber, lumber and mills were specially increased. (R. p. 345.)

The assessment of mining property, both iron and copper, seems to have been brought to a satisfactory basis, the value of the copper mines being based upon the market value of the stock, and that of the iron mines by satisfactory assessment. either through the assessors or by action of the Tax Commissioners themselves.

McLaughlin's Test., R. pp. 100, 102.
Communication from State Board of Tax Com'nrs to B'd of Equalization, R. 291.
Gullifer's Test., R. 118.

Special attention was paid to securing the assessment of all mortgages.

Freeman's Test., R. 111.
1902 Tax Commission's Report, R. 339.

Letters of instruction were given to supervisors in the direction of raising assessments of public service corporations generally. (R. p. 339.)

a. **The property of the state generally had been brought to substantially cash value by the end of 1901.**

The results of these special efforts showed the following special and immense increases in valuation by the year 1902:

There had been added to the valuations of **street railways** in the state nearly 10 millions of dollars.

Dust's Test., R. 77.

1902 Tax Commission's Report, R. 342.

There had been added on account of **summer resort** property 2 millions of dollars.

1902 Tax Com. Report, R. 342.

The assessment of the **city of Grand Rapids** had been raised from 28 millions to 71 millions.

McLaughlins' Test., R. 88.

Port Huron had been increased **4 millions** and the action of the Commission had been commended by the city authorities.

1902 Tax Commission's Report, R. 343.

Delta County had been raised $900,000 in 1902.

Rolph's Test., R. p. 161.

The additions to the assessments of the estates of deceased persons added in five counties alone about 3½ millions of dollars. (R. p. 339.)

The **reviews of** 1902 **alone** had added **32 millions** to the assessed valuation of the state. (Tax Com. 1902 Rept., R. 345.)

The most important cities and counties in the state had been admittedly raised to approximately or absolutely 100 per cent. before the 1902 rate was fixed.

The large and rich counties of Bay, Saginaw, St. Clair, Macomb, Jackson and Kalamazoo had been brought to cash value. (Twiss' Test., R. p. 66; Dust's Test., R. p. 80.)

The city of Detroit (the largest in the state) had been brought to actual cash value, and the entire of Wayne County, in which it is situated, apparently was not much, if any, below cash value. (Dust's Test., R. p. 74a.)

[The testimony contained in R. p. 74a was omitted by a clerical error from the transcript and its insertion will presumably be agreed to by counsel.]

Grand Rapids and Saginaw, the two next largest cities of the state, had been raised to cash value, or so nearly so that the Commissioners did not care to make any further raises there.

McLaughlin's Test., R. 88, 100.
Freeman's Test., R. pp. 25, 130-131.
Gullifer's Test., R. p. 118.

Kent County as distinguished from the city of Grand Rapids, had been brought to cash value. (Freeman's Test., R. p. 130.)

Washtenaw County, another of the large and rich counties, is conceded to have been well assessed. (Dust's Test., R. p. 75; Freeman's Test., R. p. 130.)

Commissioner Sayre, one of the most radical of the Commissioners, admits that the rich county of Genesee was assessed to at least 90 per cent. cash value. (R. p. 149.)

Charlevoix County had evidently been brought up practically to cash value, as only the worst parts of it were reviewed and those reviewed were brought to cash value. (McLaughlin's Test., R. p. 87.)

Roscommon County, whose assessing officers had been complained of in 1900, was admittedly assessed high enough in 1901. (Twiss' Test., R. p. 61.)

Over-valuation in some districts is even shown.

Rolph's Test., R. p. 162; Bolt's Test., R. p. 199; Stone's Test., R. p. 217; Twiss' Test., R. p. 67.)

The testimony was express that uniformity had been accomplished "in numerous counties before the 1902 average rate was fixed." (Dust's Test., R. p. 74; Bolt's Test., R. p. 194.)

The 1902 report of the Tax Commission, after felicitating the state upon the great increase in assessed valuations from 1899 to 1902 (namely, from 968 millions in 1899 to 1317 millions in 1900, and again to 1328 millions in 1901, and again

to 1418 millions in 1902) declares that the fact "that the assessment increase for 1901 was less than 1902 emphasizes the force which the Commission has exercised over these assessments when in full operation," adding: "It must not be expected that it can keep up these great increases in the future." (R. pp. 348-9.)

This report asserted that from 1899 to 1902 the assessed valuation of personal property (which had been believed to have been more greatly under-assessed than real estate) had incrased over 132 per cent., and that every county in the state showed a substantial increase. (R. p. 350.)

In view of this situation, existing at the time the 1902 assessment in question was made, as shown affirmatively by the testimony of the Commissioners and their employees and of the official reports of the Tax Commission, the claim of appellant that the assessed valuation for 1902 was but 82 per cent. of actual value, is on its face so unreasonable as to require clear and substantial evidence to overthrow the strong presumption to the contrary.

3. **The evidence presented by appellant utterly fails to overthrow the presumption of the legality of the official valuations of the assessing officers made under this close supervision of the Tax Commission and to sustain the burden of proof that property generally was substantially under-valued in the 1902 assessment.**

The evidence relied upon by appellant to sustain this burden is of four kinds: (1) The estimates of field men compared with actual assessments of supervisors. (2) The Tax Commissioners' 1901 estimate of the value of the general properties of the state as compared with the actual assessments for that year. (3) The equalized valuation of the general properties of the state as adopted by the State Board of Equalization in 1901. (4) The Commission's estimate of actual values in 1902.

Evidence of under-valuation confined to Tax Commissioners and field examiners.

It will thus be noted that the evidence of under-valuation, whether purposeful and general, or otherwise, on which appellant relies to overthrow the official assessments of the supervisors, is confined entirely to members of the Tax Commission, who seldom saw the assessed property (and who, when they did, raised it to their estimate of cash value), and to a few field examiners in the employ of the Commission. **The official assessments are not discredited by the testimony of any assessing officer.** More than this, out of the eight members who have served on the Commission since its organization, but four were produced as witnesses, and as seen later, but two of these attempt to seriously discredit the assessment of 1902 even on the score of actual under-valuation; while out of more than thirty field men who served as "examiners" during 1901 and 1902, but five are produced as witnesses to even an opinion of actual under-valuation.

Incompetent evidence. The appellee objected to the evidence of the opinions of these witnesses, both field men and Commissioners, as being incompetent and irrelevant.

(R. pp. 59-64, 70-74, 83, 84, 89-99, 107, 109, 110, 112, 113, 145-7, 160, 191-3, 214,16, 221-3, 236.)

We submit these objections were well taken and will so clearly appear when the evidence presented by the witnesses is considered.

(1.) **The work of the field examiners, both in 1901 and 1902, was wholly unreliable and furnished a less safe estimate of values than the assessments made by the assessing officers.**

The field examinations made in 1901 were for the purpose of enabling the Tax Commission to present to the State Board of Equalization (which met in August of that year) an **estimate** of the value of the taxable property of the state. The

examinations of 1902 were for the purpose of reviewing the supervisors' tax assessments.

The five field examiners sworn are Bibbins, Bolt, Davidson, Rolph and Stone.

The 1901 field examination was too hastily made to insure anything like accuracy. This is freely conceded by the field men. In the language of Rolph: "It was a **hurried examination** to get some information for the Board to act upon at the time the State Board of Equalization met." (R. p. 162; see also, Bolt's Test., R. p. 190.)

Inexperienced field men were employed. While some of the examiners had had a fair amount of experience, others were without anything like adequate experience for the work even of a careful assessment, to say nothing of the hurried and unsatisfactory estimates attempted to be made by them. Rolph, for instance, had never had any experience whatever in assessing or in valuing property. (R. p. 160.)

He was neither a farmer nor a woodsman. (R. p. 164.)

He admitted that he was totally incompetent to judge whether timber land was under-assessed or over-assessed. (R. p. 170.)

Yet he took part in making assessments of both farming and timber lands, and in providing the estimates upon which the allegations of an 82 per cent. assessment in 1902 is based.

Davidson was 29 years old, and **without any experience whatever** in assessing. (R. p. 220.)

Non-resident field men. For some occult reason, non-residents were always sent as field men. In no instance was a field man allowed to remain in his own locality where he was personally acquainted with values. (McLaughlin's Test., R. p. 100.)

Yet it is the undisputed testimony of field men Rolph, Stone, Bolt and Davidson that **resident supervisors were more competent** judges of value than non-resident field men, and

that the field men would have been more competent to value property in their own townships than in those in which they did not reside. (R. pp. 164, 196, 217, 223.)

Two methods of field examination were employed: (1) a comparison of sale prices with the considerations in deeds of conveyance, and (2) an estimate of values of "pick-ups" (or parcels arbitrarily selected) by field men and a comparison of these estimates with the supervisors' assessments.

Comparisons of sale prices with considerations in deeds. By way of verifying the consideration stated in the deed for the purpose of its comparison with the assessed valuation, the examiner made no investigation beyond inquiring from one party to the transaction (and never more than one) what the consideration was, and sometimes took only the word of a third party, and of course without knowing whether or not the truth was told.

As stated by examiner Rolph: "What was told me by one of the parties to the transaction I took for the truth, and there were no exceptions to this as I remember. That is the reason that my verified considerations correspond exactly with the true value." (R. p. 164.)

See also Bolt's Test., R. 195; Stone's Test., R. 214.

But the examiner did not even always take the sale value as the actual value. (Bibbins' Test., R. 157.)

The Tax Commissioners reported to the State Board of Equalization in 1901 that comparatively few of the large number of considerations could be proved by actual inquiry of the parties to the sales or even of outside persons having knowledge of the transactions, and that "Experience has taught us that it is not safe to accept the amount of money stated in deeds as the true considerations of the sales, and that a per cent. obtained by comparison of these considerations with the assessments of the property described would bring many erroneous results and is of little value." (R. p. 290.)

As would naturally be expected it appears that the smaller valued properties changed hands more frequently than those of larger value, and therefore that a smaller percentage of the value of the township was taken into account by the method of comparing considerations on sales with assessed valuations than would be represented by the actual number of parcels compared. (Bibbins' Test., R. p. 157.)

We submit that this method of estimating values is completely discredited.

Comparison of assessed valuation of "pick-ups" with examiners' estimates. This class of estimates was even more unreliable than the other. For the purpose of comparing the assessed valuation with the estimated value, but **one piece in each section was taken** on an average, and not always even that. (Bibbins' Test., R. 131; Rolph's Test., R. 161.) Although it is conceded that two pieces to a section would have yielded a much more accurate means of comparison.

In estimating the value of farm lands, the field men did not drive upon the land, but looked at it, determining its soil, etc. **only from the road.** As stated by examiner Stone: "We took an average piece **by looking at the map,** and **drove by that piece,** forming an estimate about it." (R. p. 217.)

Just how an average piece could be selected by looking at the map is not explained.

As stated by Davidson: "As a rule we did not have a chance to get out and minutely examine properties, but **drove through the country and looked it over.** I **have** gotten out of my rig to examine property, but as a general rule did not." (R. 223.)

The "examiners" accordingly never even **saw** a majority of the lands in the township, nor usually more than one-fourth of the area of a given section, and even this usually only from the road. (Bibbins' Test., R. p. 157.)

The examiner did not inspect, even in the way stated, on

an average one piece in each section—some sections being entirely omitted. (Bolt's Test., R. p. 196.)

The examiner did not inspect, even in the way stated, on after his own estimates had been made, and sometimes did not even tell the latter the result of his estimate. (Bibbins' Test., R. p. 155; Davidson's Test., R. p. 223.)

And sometimes did not see the supervisor at all. (Stone's Test., R. p. 216.)

Timber lands. The inspection of the timber lands was admitted by the examiners to have been anything but close. The quality of the timber was never carefully considered. The estimate was so hastily made that the examiner would only "look in a general way at five 40's in a hundred." The method is thus described by examiner Bolt: "We estimated the timber upon a number of 40's by **walking upon** the 40 and estimating it in a **rough way**—not getting it down to a fine estimate, but looking it over." (R. p. 195.)

The process by which an 82 per cent. assessed valuation of property could be arrived at by such an "examination" is an interesting subject of study.

Manufacturing plants. The large manufacturing plants were as a rule left out of consideration as "pick-ups," only the smaller properties, in which the percentage of variation was naturally larger, being as a rule taken. (Rolph's Test., R. pp. 163, 167; Gullifer's Test., R. p. 114.)

As an illustration: Masonville was the most valuable township of Delta County. Its valuation was made up very largely by one or two large properties. These large properties were not included in the report for the reason that the examiners were totally unable to determine their value. (R. p. 163.)

In this way these men "examined" twelve counties in 5½ months, each man thus "examining" on an average one township each three or four days, assuming that each county had but 16 townships. As expressed by Bibbins: "In a **general**

way we took time enough to satisfy ourselves that we were approximately correct in reference to the conditions of the soil, taking into account its location, and the value of the buildings, and the proximity to market." (R. p. 158.)

As bearing upon the nature of the estimate thus rapidly made, Rolph says: "I can take you into townships I do not think you could walk through in six months." (R. p. 166.)

And again: "Where we did not visit the section we had no personal knowledge. We could not visit half the sections in one of those townships if we worked there a year and devoted all of our time to it, not to make a thorough examination of every description. I got an average as near as I could. I could not swear it was an average of the township." (R. p. 170.)

If the maximum of four days to a township were taken, it would result that a valuation of 7,768 acres, or 144 farms of 40 acres each (1 farm of 40 acres every 4 minutes of a 10-hour day) would be accomplished by each day's work of each examiner. Of course each farm was not so examined, but unless the farms throughout the township were identical in conditions affecting value, the insufficient nature of the examination is fully as pointed. Everyone connected with these estimates, both commissioners and examiners, admit that the greatest disparity of soil, improvements and values in every way prevailed throughout every township visited.

The bare statement of the proposition given above is all that is needed to show the utter unreliability of a system of examinations which assumes to discredit to the extent of a mathematical average of 17 per cent., the actual assessments made by the official assessors.

It is admitted by the field men that their own judgment upon the same parcel might easily vary at different times, and that estimates made a few hours apart might vary as much as 10 per cent. (Bolt's Test., R. 197.)

The judgment of the supervisors was admitted by the field men to be better than their own. (Rolph's Test., R. p. 166; Bolt's Test., R. p. 196; Stone's Test., R. p. 217; Davidson's Test., R. p. 223.)

It is not surprising that the estimates made by the examiners varied greatly from the assessments made by the supervisors; not simply that the estimates were usually larger, but that they were greatly different **without any uniform difference.** (McLaughlin's Test., R. p. 105; Bolt's Test., R. p. 190; Stone's Test., R. pp. 218-19; Davidson's Test., R. pp. 222-3.)

Bibbins and Bolt frankly state that one reason for the difference in valuation between the supervisors' assessments and the field men's estimates (apart from the greater knowledge possessed by the supervisors) is that the supervisors are **conservative** in their judgment, while the field men are uniformly **radical.** (Bibbins' Test., R. p. 156.)

As stated by Bolt: "The trend of the supervisor is to get a more conservative cash value ,and the natural trend of the examiner—not so much now as in the past—has been to get a rather strained 100 per cent., rather high, and that is the natural make-up of the minds of the two." (R. p. 194.)

The latter admits that there is easily room for honest, substantial differences of opinion between the assessing officers and the estimating field men, even had the latter the same means of estimating as the former. (R. pp. 196-7.)

a. **The estimates made by the examiners were unsatisfactory to themselves.** (Bibbins' Test., R. p. 158; Bolt's Test., R. p. 167.)

The latter makes the sweeping admission: "I would not rely upon the examinations made in 1901 as a buying and selling proposition of property." (R. p. 198.)

Yet "cash value," as defined in the statute, is the price at which the property would sell.

1 Mich. Comp. Laws 1897, Sec. 3850.

b. **The field men's estimates proved equally unsatisfactory to the Tax Commissioners.**

This unsafe and unsatisfactory condition is freely admitted by Commissioner Dust and by Secretary Twiss. (R. pp. 75, 67.)

Secretary Twiss says that the field men's valuations were usually found on reviews by the Commissioners to be 10 per cent. to 15 per cent. too high. (R. p. 220.)

Yet, except where the Commissioners had held a general or special review and **brought the valuations up to cash,** they had to rely upon the valuations made by the field examiners. As an illustration of this unsatisfactory condition: In the case of the city of Grand Rapids the Commission found itself obliged to disregard the field notes of the examiners and decide that it was unnecessary to hold the review on the real estate assessments in that city. (McLaughlin's Test., R. p. 88.)

As will appear later, in the discussion of the Tax Commissioners' estimate presented to the Board of Equalization in 1901, the members of the Commission were obliged, upon their own examination in 1902, to decrease to the extent of many millions of dollars their estimates of the values of a large number of prominent counties in the state whose excessive valuations for 1901 helped to swell the Tax Commissioners' estimate for 1902, upon which the charge of under-valuation in this case is based.

c. **Differences of more than 100 per cent. in the relations between assessed value and estimated value result by including a larger instead of a smaller number of pieces in the comparison.**

Both the Commissioners and examiners admit that an **insufficient number of parcels** was taken and an **insufficient examination** had to determine the actual cash value of the properties inspected. Commissioner McLaughlin and examiners Burtlass and Stone all say (as is clearly apparent) that

the ratio of valuation depends upon the number of pieces examined. (R. pp. 102, 167, 236.)

Practical illustrations are given in the testimony of the great changes made in the ratio of "estimated value to cash value" by the inclusion of a larger or smaller number of pieces in an estimate. (McLaughlin's Test., R. p. 104; Rolph's Test., R. p. 162.)

Reference to examinations made by Stone shows that **differences of more than 100 per cent.** in the relations between assessed value and estimated value result by including a larger instead of a smaller number of pieces in the comparison. (R. p. 218.)

The examinations made were confessedly insufficient to justify an estimate of the value of an entire assessment district. By the method taken, no examination that failed to embrace all the property of the district would be sufficient. (Bolt's Test., R. p. 199; Stone's Test., R. p. 218; Davidson's Test., R. p. 223; Rolph's Test., R. p 163)

d. **The value of the entire township was estimated on the basis of the small number of parcels examined.** Yet notwithstanding this insufficient examination both as to the number of parcels and as to the manner of inspection, and notwithstanding the great disparities in ratio between assessed and estimated values in the same township, as well as the changes in average produced by values and number of parcels taken into account, and notwithstanding the inequalities of soil, improvements and values in different parts of the township (Bolt's Test., R. p. 198; Bibbins' Test., R. p. 157) the value of an entire township was estimated **as if the same conditions of relative inequality prevailed throughout the township.** As expressed by field man Bolt: "I have said in my report that the **township was worth about so many dollars,** just as though I was looking at a farm. I would say, that is a nice township,

and **in my opinion is worth a million dollars or eight hundred thousand."** (R. p. 198.)

Experience with Examiner Bolt's township. The most convincing evidence of the utter unreliability of the 1901 examinations is shown by this experience: Field examiner Bolt had been for more than twenty years supervisor of Moreland township in Muskegon County (R. p. 187). It was his undisputed testimony that in 1900 he added 100 per cent. to the 1899 valuations of his township, and in the spring assessment of 1901 added about 30 per cent. more, and **that these two additions brought it up to cash value, at which it had since remained.** (R. pp. 192, 193.)

Under the system of non-resident examiners referred to, Moreland Township was "examined" in 1901 for the purpose of the Tax Commissioners' estimate presented to the State Board of Equalization. The examiners' "estimate" of the value of Moreland Township in 1901 was that its assessed valuation (shown by Bolt to have been at cash) was but **51.6 per cent.** of cash. (R. p. 322.)

No more convincing proof of the unreliability of this estimate could well be imagined.

We submit that the 1901 field examination is completely discredited.

(2.) **The 1901 estimate of the Tax Commissioners as presented to the State Board of Equalization, was not only based upon the unreliable and discredited reports of the field men, but was shown by the subsequent experience of the Commissioners themselves to have been grossly extravagant and wholly unreliable.**

(a.) **This 1901 estimate was not an adjudication.** The Tax Commission was not charged with the duty of making a determination of the value of the general property of the state in connection with the state equalization. Its duties with respect to values of taxable property, so far as the state

equalization is concerned, were simply "to be present at each meeting of the State Board of Equalization and furnish such information as said Board may require and that may assist said Board in the performance of the duties imposed upon it by law."

P. A. Mich. 1899, Sec. 150, Subd. 10, p. 232.

If any tribunal was charged with the duty of making such determination of the aggregate cash value of the general properties of the state, it was the State Board of Equalization itself. As shown later, that Board attempted no such determination.

The Tax Commission's estimate was based on the field men's reports. The report was a mere estimate. That it was based largely if not entirely upon the reports of the field men appears without dispute. Commissioner McLaughlin says: "In the report to the State Board of Equalization we followed the report of the field men in nearly all cases." (R. p. 100.)

Secretary Twiss says: "The Commission tabulated the information obtained by this field examination in 1901. Exhibit F attached to the Bill of Complaint (including pages 295 to 332 of the Transcript of Record) contains the information by those examiners in 1901." (R. p. 61.)

This report to the Board of Equalization was based in large part upon the comparative tables prepared by the registers of deeds and county treasurers just before the 1900 assessment. There had been no additional reports of that nature since 1900. (McLaughlin's Test., R. p. 85.)

Up to this time the Commissioners had not repudiated the 1900 comparative table known as Exhibit A, and were still standing upon the estimates made by the field men. After the meeting of the Board of Equalization in 1901, the experience of the Commissioners was such as to show the unreliability of this comparative table, and the Commission was accordingly compelled to repudiate the valuations contained in it and to

refuse to place any dependence upon it. (McLaughlin's Test., R. pp. 81, 83; Freeman's Test., R. p. 130.)

The Commissioners' 1901 estimate was therefore of no higher value than the estimates of the field men just discussed, which have been shown to be unreliable and insufficient to overthrow the official assessments.

The Commission's 1901 estimate was incompetent and immaterial. In making this estimate for the State Board of Equalization it is necessarily admitted by the Commissioners that they acted almost entirely upon hearsay. Even in the comparatively few cases where reviews were had by the Commissioners before the meeting of the Board of Equalization (which was held in August) the Commissioners acted almost entirely upon hearsay, because, as before shown, the Commissioners seldom saw any considerable portion of the property reviewed. The Commissioners admit that they had in making this assessment no means whatever of determining mathematically the value of a county. (Freeman's Test., R. pp. 134, 141.)

It is naturally admitted that no accurate estimate was possible without a complete examination of all the parcels assessed. (Gullifer's Test., R. 117.)

This 1901 estimate was accordingly objected to as incompetent and immaterial. (R. pp. 281, 61, 113, 114.)

We submit it was clearly subject to those objections.

b. **This estimate has since been expressly discredited by the Commissioners.**

It aggregated 1702 million dollars. In this estimate were included some figures which did not represent even the recommendations of the Commissioners.

"We were represented as recommending 180 millions for Houghton—**which we did not recommend**—and in one or two other counties figures were put in to make up that 1702 mil-

lions **which were not our figures,** but were above our opinion of values." (McLaughlin's Test., R. p. 102.)

Not only was there frequently a variation of as much as 15 per cent. in the estimates made by the individual assessors (which is practically as great as the difference between the estimated and assessed valuation of the general properties of the state—Dust's Test., R. p. 77), but the experience of the Commissioners since that time has compelled them to admit that in the 1901 estimate they over-valued property in a great many instances. (Freeman's Test., R. p. 142; Twiss' Test., R. p. 67.)

The 1902 reviews completely discredited the 1901 estimate.

In 1902 the Tax Commissioners made a considerable number of reviews. The result of these reviews was that in **nine counties alone** reviewed by the Commissioners the values of real estate adopted by them upon such reviews were nearly 44½ **millions less** than the estimates made by those Commissioners for the very same counties included in the 1901 estimate to the Board of Equalization. (See Testimony of Commissioner Dust, R. p. 80, where the figures in detail are given.) (These counties are Bay, Saginaw, Jackson, St. Clair, Macomb, Kalamazoo, Kent, Washtenaw and Manistee.)

The result of this 1902 review in the nine counties named is admitted even by Commissioner Freeman to seriously discredit the 1901 estimate and that the discrepancies in some of the counties are serious. (R. pp. 130, 131.)

It is interesting to note, as a mathematical computation, that the 1902 experience of the Commission in the nine counties referred to, if the same throughout the state, would show that the **actual value** of the real property of the state in 1901 was but 84.6 per cent. of the amount of the Commissioners' 1901 estimate as reported to the State Board of Equalization. (Dust's Test., R. p. 80.)

A proportionate ratio of the Tax Commission's 1902 esti-

mate would produce substantially the official assessment for that year.

We submit that the 1901 report of the Tax Commission is shown to be completely discredited.

(3.) **The equalized valuations adopted by the State Board of Equalization in 1901 have no tendency to show an aggregate under-assessment of the general properties of the state in 1902.**

For the purpose of obtaining as high an estimate as possible by the Board of Equalization of the value of the general properties of the state, the Tax Commissioners entered upon an active campaign both during and previous to the meetings of the Board of Equalization, taking up the subject of the duty of that Board several weeks before the latter met, through correspondence with the Secretary of the Board and with the Attorney General, the Commissioners taking the position that it was the duty of the Board of Equalization not simply to determine the relative valuations of the respective counties as between themselves, but the absolute values. (R. pp. 281-295.)

Having obtained advice from the Attorney General in accordance with their view, the Commissioners attended and addressed the meeting of the Board of Equalization, presented to that Board their estimates of the values of the general properties of the state, and took an active part in the discussions before the Board. (R. p. 288.)

Protests were made before the Board by representatives of various counties, upon the ground that the reports of sales upon which the Commissioners' deductions were based, were valueless or misleading, and that in many instances the estimates of values made by the Commissioners were grossly extravagant. (R. p. 288.)

The opposing view was also urged upon the State Board of Equalization—that its duty was not to determine actual

values of taxable property, but only to equalize the assessments relatively as between themselves.

See Auditor General's letter, R. p. 287.
Judge Blair's opinion, R. pp. 281, 282.

The State Board of Equalization so equalized the values of the assessed property as between the various counties as that the aggregate of such equalized assessments was $1,578,100,000. The Tax Commissioners' estimate, presented to the Board of Equalization, was $1,702,471,014.

(a.) **The State Board's equalization was not an adjudication of actual values.** Whether it was the duty of the State Board of Equalization to determine actual values of the general property of the state, and what would have been the effect of such a determination, is immaterial to this inquiry. The Board of Equalization expressly limited its findings to **relative** valuations of the property of the various counties without committing itself to a judgment as to the **actual** values. This clearly appears from the record, thus: The determination of the necessity of equalization is in the following language:

> "Whereas, this Board has examined the statements of the assessments for 1901 and of the equalization made by the boards of supervisors * * * and has also heard the representatives of the several boards of supervisors, and examined the statistics prepared by the State Board of Tax Commissioners which tend to show the character and value of the property in the several counties; and
>
> Whereas, from such examination and hearings this Board finds that the relative value between the several counties as assessed for the year 1901 and equalized by the boards of supervisors as aforesaid, is not **equal and uniform**, according to location, soil, improvements, production and manufactures, but that

such assessment and valuation are **relatively unequal** as between the several counties; and

Whereas, the Board finds further from its examination of said reports and statistics that the personal estate of the several counties has not been **uniformly estimated,** therefore

Resolved, That this Board equalize such assessments as provided in Section 132 of the Compiled Laws." (R. p. 486.)

The language of the resolution of equalization is as follows:

> "Resolved, That the assessment of the several counties in the state of Michigan be and it is hereby **equalized** as follows:" (R. p. 486.)

The table of equalization contains the following column headings: "Valuation as equalized by boards of supervisors in 1901; Amount added by State Board of Equalization in 1901; Amount deducted by State Board of Equalization in 1901; Aggregate of valuation as equalized by State Board of Equalization in 1901." (R. p. 487.)

The action of the Board providing for preparation of a table showing such equalized values as compared with assessed values is in the following language:

> "On motion of Mr. McCoy, the Secretary was instructed to prepare a table, showing by counties the **valuation** according to the estimates of the Tax Commission, the assessed valuation by county boards of supervisors, the **equalization** by the State Board of Equalization in 1901, the **equalization** by the State Board of Equalization in 1896, and the percentage of the entire valuation **borne by each county** according to the last two equalizations." (R. p. 488.)

It is expressly conceded that the State Board of Equalization in 1896 did not attempt to determine actual values.

But the record is express, by the admission of appellant, that "Nowhere in the report of the proceedings of the Board of Equalization is there **any statement** of the basis of the Board's valuation; that is to say, whether or not it attempted to determine actual values." (R. p. 288.)

The action of the State Board of Equalization is thus clearly not an adjudication of actual values.

(b.) **The report of the State Board of Equalization was not competent evidence to prove under-valuation.** This proposition follows from what has been already said. This report was objected to when offered, as incompetent, irrelevant and immaterial (R. p. 281), and motion was later made to strike it out. (R. p. 489.)

Had the State Board of Equalization regarded the equalized valuation of 1578 millions as the actual value of the general taxable property of the state, such opinion would have the effect only to seriously discredit the Tax Commission's estimate of 1702 millions presented to the Board of Equalization. It would doubtless have been even more seriously discredited could the experience of the Tax Commissioners in the 1902 reviews have been anticipated.

(4.) **The estimate made by the State Board of Assessors of the value of the general properties of the state in 1902 does not prove an under-valuation of those properties in the year in question. This estimate was not a legal adjudication of actual values. It was without substantial basis and was largely pure guess. Its basis, so far as it had any, was for the most part the same 1901 dicredited estimate of the field men. It even failed to represent the actual opinions of the individual members of the Commission at the time it was made.**

(a.) **The 1902 estimate was not a legal adjudication of actual values.** The assessment rolls of general property, after being completed by the assessing officers, are submitted to local boards of review, and are then subject to review by the

State Tax Commissioners, who can change values, add omitted property, or even make new rolls if desired.

The law provides that when the Tax Commissioners do not intervene, the assessed valuations as reviewed by the local boards of review, are final, and that when the Tax Commissioners do intervene, their action upon the rolls themselves becomes final.

P. A. Mich. 1899, Sec. 152, pp. 232, 233.
Tax Com'nrs vs. Quinn, 125 Mich. 128.

The assessment rolls **as finally reviewed,** for 1902, aggregated (in round numbers) 1418 millions. The average rate of taxation paid throughout the state upon property generally was thus $16.55 -|- per each one thousand dollars of assessed value. When the State Board of Assessors (which values railroad property) met at the end of 1902, after the assessment valuations of general property for that year had become absolute, and the taxes spread, Commissioners Freeman and Sayre conceived the notion of decreasing the average rate of taxation to be assessed upon railroad property, by adopting **for the purpose,** and for **that purpose only,** a valuation of the general properties of the state in excess of their assessed valuation as finally reviewed and adjudicated by the assessing and reviewing officers.

A valuation of 1715 millions was adopted **for that purpose.** Commissioner Freeman advocated the same upon the ground that it would be likely to prevent attacks by the railroads upon the 1901 railroad **ad valorem** tax law in question.

McLaughlin's Test., R. p. 103;
Freeman's Test., R. p. 135.

The Michigan Supreme Court held, in proceedings brought directly to review the action of the State Board of Assessors, that the Board had not jurisdiction to make such determination of actual values as against the actual and finally assessed valuations of general property which inflexibly con-

trolled, and that the duties of the State Board of Assessors in determining the average rate were purely mathematical, saying: "We think the clear intent of this (the constitutional) provision is that the rate which is **actually levied** upon property **actually assessed** is the rate contemplated by the language employed."

B'd of Education vs. State B'd of Assessors, 133 Mich. 116.

It should go without saying that the attempted action of the State Board of Assessors, held by the highest court in the state, in construing its own statutes and constitution, to be without jurisdiction, was not a legal adjudication that the value of the taxable property of the state was in excess of the officially assessed and reviewed valuation.

Nor has the Board of State Tax Commissioners made or attempted such adjudication.

The only way in which the Tax Commissioners could adjudge values is in the manner provided by the statute, namely: by reviews, general or special, of the assessment rolls themselves, or of individual assessments thereon, previous to the spreading of the taxes for the year.

It was because the assessments for 1902 as finally reviewed were final and conclusive, that the Supreme Court of Michigan denied the power of the State Board of Assessors to adopt a new valuation.

The fact that the membership of the Tax Commission and the State Board of Assessors is the same, makes no difference. As Tax Commissioners their power to review the valuations for the year ended when the taxes were finally spread, and as has been said, the only method provided for such review by the Tax Commissioners is by way of reviewing the assessments upon a given roll either in whole or in part. The Tax Commissioners, therefore, **had no power** to again determine the

values of the property of the state until the assessment rolls of 1903 should be under consideration.

But the record is express that the Tax Commissioners have never attempted, regularly or otherwise, to determine the value of the general property of the state for 1902 otherwise than as appears in the rolls, which show the aggregate value to be 1418 millions. It was only the State Board of Assessors which attempted to determine the greater value and whose action the Supreme Court held null.

See Rept. State Board of Assessors, R. p. 347.

(The report of the Tax Commission closes at page 49 of that report, and the extracts from the report of the State Board of Assessors begin with the last paragraph on page 345 of the Transcript of Record. See R. pp. 72-3, 347.)

See also Answer of B'd of Education, R. pp. 28, 30, 26.

Freeman's Test., R. 142-3, 144.

The record is express that the total assessed valuation of the general property of the state, after all reviews thereof had been had, was 1418 millions (round numbers). (R. p. 4.)

Freeman's testimony (R. p. 126) regarding the determination by "our Board," does not refer to the Board of Tax Commissioners, but only to the State Board of Assessors.

Had the Board of State Tax Commissioners made such adjudication of a 1715 millions valuation, the case of Board of Education vs. State Board of Assessors could not have arisen.

Answer in Board of Education case. The attempted action of the State Board of Assessors having been without jurisdictional authority, it is idle to say that the answer of the members of that Board in a suit brought to set that action aside, was a legal adjudication of property values. Commissioner McLaughlin distinctly repudiates the answer as overstating his views as to values. (R. pp. 95-7, 104.)

The testimony as to this estimate was objected to by appellee as incompetent, irrelevant and immaterial, and we submit the objection was well taken.

Record, pp. 63, 93, 126.

(b.) **The 1902 estimate was without substantial basis and largely pure guess.** The process by which this 1715 million estimate was reached by the State Board of Assessors is thus stated by Commissioner McLaughlin:

"We took our report to the State Board of Equalization as a basis, and that total was 1702 millions, in which we were represented as recommending 180 millions for Houghton—**which we did not recommend**—and in one or two other counties figures were put in to make up that 1702 millions **which were not our figures** but were above our opinion of values * * * We allowed something for Houghton and other counties of that kind, then compared in a general way the values of counties reported to the State Board of Equalization and the value of those counties as we had determined them by our later and fuller examinations, and found that upon our later and fuller examinations in 1902, in counties where we had made general reviews, **our value did not come up to the figures of these counties in 1901.** * * * We **made a guess** at what the rest of the counties would show by the same kind of work, with the result that we reduced materially that 1702 millions of dollars. Then we **made a guess** as to the amount of personal property in the state that was not assessed, and the two together were somewhere around 1715 millions. I can't tell how much personal property was put in; I objected to the whole plan of doing that; my objection was based on the idea that it was a guess, and that our action would be a guess and indefinite, that our action was controlled by the statute and that we could not use our judgment but were held to the assessed value. When we were trying to find out that amount,

we were guessing too much and hadn't data enough." (R. pp. 102-3.)

Even Commissioners Freeman and Sayre, whose unsuccessful attempt to enforce this estimate seems to have affected their attitude throughout this litigation even to the extent of causing them to make voluntary affidavits in support of the appellant herein—admit that the amount of 1715 millions was not the result of any mathematical process or computation. (R. pp. 132, 133, 151.)

"I did not understand that there was any certainty about the 1715 millions; that was the best estimate that the Board could make, some of the members being above and some below. No certain way that any man could figure out to the others that he was right and the others wrong." (Sayre's Test., supra.)

Nor has the Tax Commission by its 1902 report attempted to determine even that a general condition of under-valuation was "well known to exist" in 1902, as implied in some of the questions put to appellant's witnesses, as, for instance, that to Commissioner McLaughlin on page 94. The expression referred to is found only in the 1901 letter of the Commissioners to the State Board of Equalization written previous to the adjourned meeting of the Board. It was a part of the general claim of the Commission of an under-valuation in 1901 based on the six repudiated field examinations of that year. (R. p. 294.) It was never embraced in any report of the Tax Commission, except that in the 1902 report was published the 1901 correspondence with the State Board of Equalization.

No one has attempted to show how the result was reached. Freeman says: "I do not know what the members of the Board made up their figures from to reach that 1715 millions. * * * Did not take 1702 millions as a starter, but it had much to do with my determination. I thought of it and we

spoke of it. * * * I talked of the work and the data that came out of the matter that appears in this Exhibit A, and that entered into my calculations to some extent in settling the matter in my mind that the property of the state was not assessed at value." (R. p. 132.)

As already stated, Exhibit A was later absolutely repudiated by the Commissioners as too unreliable for use.

Both Commissioners Dust and McLaughlin expressly say that the estimated amount included a **substantial sum** by way of pure guess. (R. pp. 92-3, 102-3, 77.)

Even this guess involved differences of opinion among the Commissioners at least as great as 15 per cent., which is practically the amount of the claimed under-assessment.

Dust's Test., R. p. 77.
McLaughlin's Test., R. p. 99.

Commissioners Dust and McLaughlin expressly testify that at the time of making the 1902 State Board of Assessors' estimate they regarded it as too high. Mr. McLaughlin states that he expressly disapproved of the amount. (R. pp. 93, 98, 99, 102.)

While the answer in the Board of Education case attempted to justify this extravagant estimate, Commissioner McLaughlin says that this answer did not meet his approval and gave a wrong impression, that it stated the case entirely too strongly and that he signed it merely to try and sustain the action of the Board, although it had been had against his judgment. (R. pp. 95, 96.)

Commissioner Dust says that he at the time regarded the assessment by the supervisors as averaging certainly more than 90 per cent. of cash value. (R. pp. 76, 78.)

The nine prominent counties reviewed by the Commissioners after the 1901 equalization, brought, as before stated, but 84.6 per cent of the Commission's estimate on the same counties made to the State Board of Equalization. **A like per-**

centage of the 1715 million estimate of 1902 would have been but 1450 millions as against an actual assessment of 1418 millions, or but about 2 per cent. above the actual assessment.

The 1902 estimate of 1715 millions was based upon the 1901 field examinations and the 1901 estimate to the State Board of Equalization.

This fact is expressly stated by Commissioner McLaughlin as before quoted (R. pp. 102-3) and is in no way disputed, except in an indefinite manner by Commissioner Freeman. (R. p. 132.)

Without refining on definitions, it is plain that the 1902 estimate was largely based on the 1901 field men's estimate and the discredited field men's examinations. For the most part the Commissioners **had no other basis**—except so far as they guessed—for in 1902 field examinations were had in but 16 counties out of the total of 84 in the state, and reviews were had by the Commissioners in only the 16 counties, as against 30 reviews had in 1901; while of the 16 "examined" but four counties were entirely reviewed in 1902, namely: Macomb, Bay, Kalamazoo and Jackson. (R. pp. 87, 125, 149.)

While some of the results of the 1902 examinations may have been taken into account, the extent to which those examinations were considered is not shown, and no one claims that the 44½ millions discrepancy between the Commissioners' 1901 estimate in nine counties alone, and the Commissioners' 1902 reviewed values, was taken into account. There is no evidence that the results of the 1902 reviews were ever tabulated. Indeed, neither Commissioners Dust nor Freeman, to whose attention the discrepancies referred to were called on their examinations as witnesses, seems to have been familiar with that result. (R. pp. 80, 130.) But aside from this consideration, the fact remains that no one has been able to even suggest how the 1902 estimate was arrived at (apart from the element of guess) unless by reliance almost entirely

upon the discredited 1901 estimate. And, although the testimony in this case was taken in 1904, when the Commission had had two years more for examination and reviews, there is nothing in the record to indicate that the remaining counties in the state (aside from those reviewed in 1902 with the results mentioned) did not prove to have been as greatly over-estimated in 1901. On the other hand, the fact that the reviewed assessment rolls of 1903 aggregated but 8 per cent. above the assessments for 1902 in question, tend strongly to prove such general over-estimate in 1901 (and thus in 1902), for both Commissioners Dust and Gullifer admit without dispute that the increase in assessment for 1903 does not indicate a corresponding under-assessment in 1902, for the reason that substantially all, if not all, of that 8 per cent. increase can be accounted for by actual **increase in intrinsic values** of the property assessed from 1902 to 1903—that period being, as is well known, one of unusual increases in values throughout the entire country. (R. pp. 76-7, 120.)

See, also, Freeman's Test., R. p. 142.

In the same connection it is interesting to note that the aggregate reviewed assessments of general property for 1904 were a trifle less than for 1903.

See 1904 Report of State Tax Com'nrs. Tables 9 and 10.

Unless, therefore, the field examinations of 1902 show a system of under-valuation **then existing**, the 1902 estimate must rest entirely upon the discredited estimate of 1901.

(c.) **The field examinations of 1902 show no system of under-valuation then existing.** For the purpose of showing a practice of under-assessment continuing in 1902, appellant introduced some testimony of field examinations had in that year. The results of those examinations lend no corroboration whatever to the claim of under-valuation in the 1902 assessments as reviewed. During the year 1901, 32 men were

employed by the Tax Commissioners in making the field examinations throughout the state on whose work the 1901 estimate had been made. When the testimony in this case was taken (in 1904) 13 of these men were still in the employ of the Commission, in addition to 21 men who had been employed previous to the fixing of the rate in 1902. Of this entire number but five were produced as witnesses regarding field examinations and estimates.

It is significant that the evidence of under-assessment by supervisors in 1902 is confined to seven counties out of the 16 actually examined and reviewed that year by the Tax Commissioners, namely, the counties of Clinton, Oakland, Calhoun, Delta, Montcalm, Shiawassee and Menominee. These 1902 estimates of field men are discredited both generally and specifically—

First. By the general discredit given to the 1901 examinations as before discussed in this brief. The 1902 examiners had all taken part in the discredited 1901 examination, and there is nothing in the record to show that the examinations in the latter year were substantially more careful than in the former.

Second. The few townships in Oakland and Calhoun counties (2 in Oakland and 12 in Calhoun) testified by Bibbins as examined by him in 1902, were estimated by him as assessed at but 87.6 per cent. and 79 per cent. respectively of cash value, yet he admits that the **entire of Calhoun County** averaged in his judgment 90.6 per cent. of the sale prices in 1902. (R. pp. 154-5, 158.)

And it is admitted by examiner Bolt (and without substantial dispute) that so radical was the tendency of the field examiners to make extravagant estimates of values, that an assessment by a supervisor at 10 per cent. or even 15 per cent. less than the estimates of the field examiners would properly be regarded as true cash value.

"Q. So when you find a township that is up to, say, 90 per cent. of its true cash value, in your judgment, you recommend to the Commission that there is no immediate necessity for action in that township? A. Yes, sir; that is my manner, and I believe the Commission feel that way too." (R. p. 194.)

"And when I find, as I did in one of those townships (Shiawassee County) that the property was assessed at approximately 50 per cent. of what I thought was its value, I would say that the property was substantially assessed at its cash value." (R. p. 199.)

Third. The estimates of fieldman Stone as to Calhoun and Oakland Counties are likewise completely discredited by the fact that although he worked during 1902 in the counties of Kalamazoo, Macomb, St. Clair, Jackson, Calhoun, Oakland, Ionia, Lapeer, Livingston, Cheboygan and Eaton, he picks out only **Calhoun and Oakland** as containing any **townships under-valued**, and Calhoun County entire was substantially valued at cash. His examination of the first four counties in the list above given are not produced, but they are four of the nine counties whose 1901 estimates were found so grossly extravagant. For anything appearing in this record, the 1902 estimates of the field men were equally extravagant.

Fourth. Davidson's estimates of part of Clinton County are discredited by the fact that his estimates of Port Huron (which seem to have been made in the same way as those of Clinton County) were admitted by him to have been found too extravagant for later acceptance by the Commissioners.

"The examination carried on in Port Huron was similar to that in Clinton County except that we **did not examine every piece in Clinton County.** Where we made examination of **every piece in the City of Port Huron,** the Board concluded my valuations were too high." (R. p. 224.)

Davidson's 1902 examinations are further discredited by

the fact that he took part in the Menominee examinations of that year, which proved too unreliable for use. (R. p. 220.)

Fifth. **The Tax Commissioners have expressly disapproved the field men's estimates of 1902.** The field men's estimates of Menominee County for 1902 were expressly found by the Commissioners to be unreliable. (McLaughlin's Test., R. p. 106.)

Macomb is one of the counties in which a general review was had in 1902, and is one of the nine whose assessments for that year as reviewed by the Tax Commissioners aggregated 44½ millions less than the 1901 estimates. The field men's valuations of Macomb County for 1902 are not shown, nor are those of Lapeer, Livingston, Cheboygan or Eaton Counties. In each of the counties examined by field men (aside from the four in which general reviews of the entire county were had) special reviews were had by the Tax Commissioners covering such portions as seemed to need reviewing, namely, those worst assessed, and the assessments of all these counties as reviewed by the Tax Commissioners **were included in the 1418 millions** aggregate official valuations for 1902 as **assessed and reviewed.** The 1902 examinations have thus no effect except to emphasize the glaring exaggerations of the field men's estimates for 1902 as well as for 1901; for the 1902 reviewed valuations of all the counties so reviewed were not only but slightly in excess of the assessed valuations of 1901 (and in Delta and Menominee counties, below), but were in all cases greatly below the estimates made by the field men, as shown by the following comparative table:

	Ass'd Val'n 1901.	Ass'd and Reviewed Val'n 1902.	Reference to page of Trans. showing field exam. percentages 1902.
Montcalm	8,300,962	8,520,797	189, 192
Clinton	16,308,920	16,801,613	91, 222
Oakland	29,566,275	32,502,383	155, 216
Calhoun	30,268,528	32,088,179	91, 154, 215
Shiawassee ...	17,107,611	17,340,907	90, 192
Menominee ...	9,692,386	9,305,744	92
Delta	7,526,035	7,376,508	161

(See comparative tables on pages 355 and 356 of the Record.)

The fact that in 1901 one or more (and sometimes several) assessing districts were found in each of **32 counties** of the state in which, even according to the radical ideas of field examiners, property was being assessed at 50 per cent. (and sometimes at a much higher percentage) of its value (50 per cent. of a field man's estimate being regarded by the Commissioners as the equivalent of cash value) and that in each of **eight counties** one or more assessment districts were found by the examiners to be assessed at or above 100 per cent. of cash value, not only emphasizes the great advance in property valuations made since 1899, but disproves the existence of any general system of under-valuation even in 1901.

Note.—The counties containing districts assessed at 90 per cent or higher are the following: Alger (R. p. 297), Allegan (R. p. 297), Alpena (R. p. 298), Antrim (R. p. 298), Arenac (R. p. 298), Bay (R. p. 299), Benzie (R. pp. 299, 300), Charlevoix (R. p. 302), Eaton (R. p. 305), Emmet (R. p. 306), Genesee (R. p. 306), Huron (R. p. 309), Ionia (R. p. 311), Iosco (R. p. 311), Isabella (R. p. 312), Jackson (R. p. 312), Lake (R. p. 314), Lapeer (R. p. 315), Livingston (R. p. 316), Mackinaw (R. p. 317), Manistee (R. p. 318), Mason (R. p. 318), Monroe (R. p. 320), Muskegon (R. p. 321), Newaygo (R. p. 322), Oceana (R. p. 323), Ottawa (R. p. 325), Presque Isle (R. p. 325), Shiawassee (R. p. 327), Tuscola (R. p. 329), Washtenaw (R. pp. 330-1), St. Clair (R. p. 219).

The Counties containing districts assessed at 100 per cent. or higher are the following: Chippewa (R. p. 303), Delta (R. p. 305), Iosco (R. p. 311), Lake (R. p. 413), Mackinaw (R. p. 317), Presque Isle (R. p. 325), Wayne (R. p. 331), Wexford (R. p. 332.)

b. The evidence of under-valuation is thus confined to the opinions of Tax Commissioners and field examiners.

c. We submit that this evidence is clearly shown to be incompetent for lack of sufficient basis therefor.

No testimony of assessing or reviewing officers impugning the correctness of the official assessments having been introduced, the defendant was not called upon to present testimony of such officers in confirmation of their official acts, and to sustain their official valuations.

To sum up the situation: The 1901 estimated valuations are completely discredited. No other basis exists for the 1902 estimate except the 1902 field examinations. Not only are these 1902 field examinations discredited, but the reviews of the territory so examined are included in the 1902 official assessments. The assessments and reviewed valuations for the two following years confirm the substantial correctness of the 1902 assessments. It is impossible that a general system of substantial under-valuation could have continued for several years under the supervision exercised by the Tax Commissioners without fraudulent participation on their part. Such participation is not so much as suggested. There is thus nothing reasonably tending to overthrow the presumption of correctness which attends the official assessments of the supervisors. It follows that the assessments made by the assessing officers in 1902 represented the cash value of the general properties of the state as nearly as it is practicable to obtain it and that the claim of substantial under-valuation of the general properties of the state in 1902 is unsustained by proof.

SECOND.

Even should an aggregate under-valuation of the general properties of the state be found to have existed in 1902, such under-valuation was not fraudulent or intentional, nor was it the result of a concerted rule of conduct.

It has never been claimed by either field men or commissioners that there was any evidence of fraudulent under-assessing at any time except as some of the assessors are claimed to have under-assessed for the purpose of "keeping even" with the other assessors, and thus preventing unfair discrimination against their own districts. (Dust's Test., p. 76.)

Passing by the question whether a practice of that nature would amount to a fraudulent under-assessment, it is clear from the record that whatever may have been the situation in 1899 and the year or two following, by the year 1902 at least all evidence of intentional under-valuation even of the nature above referred to, had disappeared.

This would naturally be expected from what has appeared of the general history of the movement for uniform taxation, and the actual results of the work of the Tax Commissioners as shown in the substantial increase in assessments from year to year.

But the testimony of the Commissioners and field men themselves is a complete exoneration of the assessors from the charge of intentional under-valuation in 1902.

Character, intelligence and standing of assessors. The testimony of both Commissioners and field men is, without exception, an endorsement of the character, intelligence and standing of the supervisors generally throughout the state. For instance, Dust and Bibbins say that as a rule the supervisors were honest and conscientious. (R. pp. 74, 156.)

Rolph and Stone put themselves on record with the assertion that the supervisors as a rule were honest men, of good

judgment, and that they tried to make fair assessments. (R. pp. 165, 167, 217.)

Davidson says that the supervisors were thoroughly competent and fit to assess property. (R. pp. 223, 224.)

Admissions of intentional under-valuation were few, and are confined to earlier years. Testimony of such admissions was objected to on the part of appellee as hearsay, incompetent and immaterial. (R. pp. 70, 72, 73, 83, 109, 125, 146.)

We submit that these objections were well taken.

Commissioner Freeman, who has been a member of the Commission from the start, and who is not only the most radical of all, but evidently is largely influenced by his early experiences in 1899, while attempting to express an opinion of intentional under-valuation in the earlier years, does not attempt to state the existence of such a condition in 1902. His radical attitude permits him to say that in the earlier reviews he thinks he heard 500 different assessors admit that they had under-valued property. (R. p. 126.)

Not only is he the only person who makes any statement of any substantial number whatever, but this statement on his part is shown to have been recklessly extravagant. He is unable to recall but **one occasion** on which an admission of that nature was made, and cannot recall **any person whatever** who made such admission. (R. p. 135.)

It is conceded that if such admissions were made in the course of reviews or meetings with boards of supervisors, the official stenographer who reported the proceedings ought to have a report of it. (Sayre's Test., R. pp. 147, 151.)

Note.—(The quotation on page 146 of the Transcript of record regarding admissions of under-assessments does not refer to admissions by assessing officers. The quotation refers to the arguments of representatives of counties before the State Board of Equalization in 1901. See 1902 Tax Com. Report, p. 36.)

The stenographer of the Commission who reported the proceedings of all the meetings, says that a careful examination of his records shows but two instances where such admissions were ever made in his hearing (R. p. 471) although he reported at least 100 reviews. He adds that even in the two instances mentioned **there was no admission that the under-valuation was wilful.** (R. p. 472.)

So far as later years are concerned, the most definite statement that can be obtained from Commissioner Freeman is that some admitted actual under-assessment in the spring of 1901, but does not attempt to say that even then there was any considerable number of such admissions. (R. pp. 109, 110, 111, 123.)

Even Freeman does not assert that there were any admissions whatever of under-valuation, intentional or otherwise, in 1902, except as might be implied in the following item:

He was asked whether, in the opinion of the Board **at the opening of the year 1902,** the under-valuation was intentional. This question was objected to as incompetent, immaterial and irrelevant (R. 122), and we submit, is so objectionable. The question not only relates to assessments before 1902, but the answer disavows even a belief in a general intentional under-valuation, and relates, moreover, to the judgment of others than himself.

"A. Some of it was intentional, I haven't any doubt, and some of it was ignorance, carelessness, and some of it I believe the assessors thought they were assessing at value, and some were so near to value that there might be differences of judgment about it—all kinds of belief, varying with different conditions in the assessing officers over the state." (R. p. 123.)

Sayre's version is that during his **entire work as Tax Commissioner** he had heard about 80 supervisors admit an under-valuation **in this way:** (R. p. 150.)

"There would have to be an explanation as to that. If

you take the ordinary supervisor and ask him if he is assessing at cash value, he will answer yes at once; if, then, you take the sales and go over them and the data we have collected with him, why he will admit he is not assessing at cash value **as we understand it,** and that is true in I should say three-fourths of the cases that I have talked with the supervisors." (R. p. 146.)

Not only does this fall far short of testimony of **intentional** under-valuations, but it does not appear that any experiences of that kind occurred as late as 1902.

The most that Commissioner McLaughlin will say is that some supervisors admitted that "it **had been** their custom to assess property in their districts" at something less than 100 per cent. of its real cash value (R. p. 83) and adds that such admissions were few—"a small proportion of the whole." (R. p. 104.)

The most that Commissioner Dust can say on the subject is that he "cannot remember specific instances where supervisors admitted that they were assessing at less than true cash value and could not mention any particular supervisor," and that admissions of this character have been rare. (R. pp. 73, 75.)

Secretary Twiss, who was with the Commission from the beginning, is express in his statement that he never **heard any admissions of under-assessment on the part of assessors.** (R. p. 68.)

The fact that no complaints were made of violations of the law on the part of assessing officers after 1900, is convincing evidence that there were few, if any, admissions of violations of law after that time.

The field men heard no admissions of intentional under-valuation. The field men were always expected to consult with the assessing officer in connection with their own valuation of the property, although they did not usually do so until after

their own estimates were made. The object of this was to confront the supervisor with the field men's estimate and **find out the reason of the discrepancy.** This would be the natural occasion for admissions of under-assessment, if such were the fact. Yet not a field man testifies to any admission of that nature except that Stone once said on his direct examination, that supervisors sometimes admitted, after being shown the field men's estimate, that their own assessments were not at true cash value. Even such admissions did not include intentional under-assessment; but Stone afterwards retracted the statement, and said that the supervisors always claimed to assess at cash value.

"They would say that they were assessing all alike, the poor and the good all the same, and that at cash value. That they were following the law as they saw it." (R. p. 219.)

Bibbins says he never heard from a supervisor an admission of under-assessment. He says that when his own estimates were higher than the supervisors' assessments, the latter always insisted that his estimates were above cash value. He says: "I met most of the supervisors of the townships where I did my work. They were men that fairly represented their people. In a general way I should say that I did not meet any of these men who I think were **intentionally** dishonest in their work, meaning that they were **intentionally** misrepresenting values." (R. p. 156.)

Rolph says that when a sale price was shown greater than the assessed valuation, the supervisors insisted that the property had been sold for more than it was worth. Not only might this readily have been so, especially as most of the parcels sold were of smaller value, but Rolph expressly says that the supervisors may have been right about it. (R. pp. 164-5.)

No discrimination against railroads. The record is express and uncontradicted that there was at no time visible

any disposition on the part of the assessors to discriminate against the railroads.

McLaughlin's Test., R. p. 105.
Dust's Test., R. p. 75.

There was no concert of action. Not only is there no testimony in the record of any concert of action among assessing officers, but the express testimony of those engaged in the Commission's work is that no such concert existed. Commissioner Sayre testifies that he never even heard of supervisors getting together and agreeing to under-assess, except in one case, and that was a newspaper report merely. (R. pp. 146-7.)

On the other hand, the testimony is express and undisputed on the part of Commissioner Freeman and examiners Bibbins and Stone, that there was no concerted action whatever among the supervisors in the direction named. (R. pp. 142, 159, 219.)

No uniform under-valuation at any time. During the early taking of the testimony an attempt was made to show that the under-valuation, so far as it existed, was "uniform."

This was probably for the purpose of showing concerted action. The evidence, however, is a complete denial of this proposition. The testimony of every witness is saturated with admissions that the relations of assessed to actual value, according to the estimates of the various examiners, varied with every case.

See Bolt's Test., R. p. 190.
Gullifer's Test., R. p. 117.

Commissioners' opinions of intentional under-valuation were objected to as incompetent. The claim of intentional under-valuation in 1902 is entirely unsupported by proof.

THIRD.

Whatever general property under-valuation may have existed in 1902 was sporadic and not general throughout the state.

The very fact that the assessing officers had generally shown from the start a willingness to obey the law as explained to them by the Commissioners in 1899; that wherever admissions of under-valuation were made the counties were raised to cash value (R. p. 148); that the large additions referred to had been made with respect to specific properties; that the most populous cities and counties of the state had all been brought up to cash value and that the influence of the Commission had extended even beyond the actual visits and reviews held by the Commissioners; the immense raises in assessed values from 1899 to 1902 inclusive, and the fact that in parts only of the six counties are under-assessments, even previous to the 1902 reviews by the Commissioners, attempted to be shown, constitute a complete refutation of the charge of a general under-assessment of property in that year.

The history of the work and results accomplished by the Commission shows that the existence of such a general system of under-valuation was absolutely impossible in 1902.

The appellee moved to strike out the testimony of under-valuation, and we submit that the motion should be granted. (R. p. 281.)

We submit that the charge of general and intentional under-valuation of the general properties of the state for the year in question, has been completely exploded.

The Adjudicated Cases.

1. **When relief granted.**

In no case in which relief has been granted on account of under-valuation of other property, do the facts bear any reasonable relation to those in this case.

In **Pelton vs. National Bank,** 101 U. S. 143, which was a suit in equity to restrain the collection of taxes on the capital stock of the bank beyond a certain amount paid by the bank, the **undisputed evidence** showed that national bank shares were assessed from 50 per cent. to 60 per cent. above other moneyed capital, and that "it was a **principle deliberately adopted** to govern their action in the valuation of all the shares of national banks, and was applied to them all without exception."

In **Cummings vs. National Bank,** 101 U. S. 153, the evidence showed that there were four different bodies acting independently in the assessment of as many different classes of property, namely, real estate, personal property generally, banks and railroads. The Court found the facts established as follows:

> "The assessors of real property, the assessors of personal property and the auditor of Lucas County * * * **concurred in establishing a rule of valuation,** by which real and personal property, except money, was assessed at one-third of its actual value, and money or invested capital at six-tenths of its value, and that the assessment of the shares of incorporated banks as returned by the state board of equalization for taxation to the auditor of Lucas County was fully equal to the selling price of said shares and to their true value in money."

These facts were established, as stated by the Court:

> "by the testimony of four or five district assessors, by the auditor of the county for the year 1876 and for several previous years, who had long been an employee in that office. It was also shown by six witnesses that at one time the auditor of Lucas County held a conference with the auditors of the counties of Fulton, Williams, Defiance, Henry, Pauld-

> ing, Ottawa, Wood, Sandusky, Seneca and Van Wirt, and that the **rule by which property was valued** in Lucas was the **result of this conference** and was to be applied **in all these counties.** The district assessors whose duty it was to make this primary valuation of all personal property (except bank stocks and railroad property) also testified that for the year 1876 they had a meeting and **adopted that rule of valuation** as their guide and so applied it. **All this is uncontradicted."**

Comment upon the distinctions between that case and this seems unnecessary.

In **First National Bank vs. Lucas County,** 25 Fed. 749, (U. S. Cir. Ct., Nor. Dist. Ohio), the evidence showed that national banks were assessed in accordance with their returns of capital, surplus, etc., and that **other property was assessed at six-tenths of its value by common agreement.** The board of equalization equalized each class separately. The Court said:

> "But there was a **'system'** in it beyond that, if anything more be needed. There is conflict in the proof as to the fact whether the assessment at six-tenths was the result of formal action by the taxing officials, but none that **there was a general understanding to that effect."**

Here, likewise, the differences are obvious.

In **Taylor vs. L. & N. Railway Co.,** 31 C. C. A. (6th Cir.) 537, the facts were found to be that property generally was **assessed systematically** at 75 per cent. and that real estate was **intentionally and deliberately** equalized at 75 per cent., which had been **adopted** by the board of equalizers as a **rule of action;** that the property of the railroad had been assessed at 100 per cent. The testimony of 150 witnesses covering 35 counties, many of them county assessors, and the testimony of the board

of equalizers as to the existence of the custom is said by the court to leave not the slightest doubt that the **custom was systematic, uniform, and well understood.** There was no evidence to contradict this.

Complainant has attempted to bring its case within the case just cited, but a comparison of the facts of this case with those presented in the Taylor case show how utterly they have failed to do so. In the Taylor case not only was the evidence of systematic conduct and the adoption of a deliberate rule of under-valuation clear and uncontradicted, but there is another important, distinguishing fact. In the Taylor case one and the same board assessed both classes of property and this board in assessing railroads was guilty of express and intentional fraudulent under-valuation; while in this case the members of the State Board of Assessors which valued the railroad properties, were, as tax commissioners, clothed with the final power of passing upon every assessment of the general properties of the state, and of not only reviewing and revising the same, but even of making new and original assessments with reference to every item thereof. There is no suggestion that the tax commissioners acted fraudulently in permitting an under-valuation of the general properties of the state. On the contrary, the existence of a system of under-valuation by concert between assessing officers, without the co-operation of the tax commissioners, is absolutely impossible under the powers given to, and exercised by the Commissioners.

The fact that the Michigan Tax Commissioners not only possess the complete powers of supervision before referred to over all tax assessments, being the final arbiters and board of review thereon, but have even original authority not merely to increase assessments and to add property to the assessment rolls, but to make out entirely new assessment rolls, places the Michigan Tax Commissioners and the Michigan system of

taxation in a class by themselves. Under this system the assessments finally adopted throughout the state bear no relation to those in question in the adjudicated cases where fraudulent under-valuation was shown or alleged. No such thing as a general practice of under-valuation throughout the state or any considerable portion of it can continue without the concurrence of the Tax Commissioners—much less a fraudulent concert of action among assessors.

In **Chicago Union Traction Co. vs. Board of Equalization,** 114 Fed. 557 (U. S. Cir. Ct.), the testimony showed that the State Board had **deliberately taken a standard** of 70 per cent. to equalize all property by. These, and other things, convinced the court that the action of the Board was not its own and was fraudulent as far as complainants were concerned.

In **Walsh vs. King,** 74 Mich. 350, a **corrupt agreement** between assessors and vessel owners was proven, by which the property of the latter was assessed at **one-tenth fo its value.**

In **Solomon vs. Osceda,** 77 Mich. 365, and **Auditor General vs. Prescott,** 94 Mich. 150, an intentional and purposeful omission of a large and valuable class of property from the assessment rolls was clearly shown.

In **Bureau County vs. Railroad Co.,** 44 Ill. 229, defense was made to an action for the collection of a tax, that property in general was valued at one-fifth to one-third, and that of the railroad much higher. The Court said:

> "The rule adopted by the assessors has grown into a custom and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. * * * It is an **admitted fact** on both sides of the controversy that the property of **no owner** in the County of Bureau has been **taxed on its real value.**"

In **Railroad Co. vs. Commissioners,** 54 Kas. 781, the state board, which alone had jurisdiction of railroad property, as-

sessed it at its cash value. The **county assessors** at a meeting **agreed to assess all property at 25 per cent.**

In **Randall vs. Bridgeport,** 63 Conn. 321, the testimony showed a **uniform rule of assessment** of real estate at 50 per cent. while that of appellant was at its full cash value.

In **ex parte Bridge Co.,** 62 Ark. 461, the testimony showed that property was **assessed generally at a uniform rate of 50 per cent.** while the property of the Bridge Company was assessed at its **full value.**

2. **Cases where relief was denied.**

On the other hand, in numerous cases where the evidence of unjust discrimination was much greater than here, relief has been denied.

Bank vs. Miller, 19 Fed 372.
Louisville Trust Co. vs. Stone, 107 Fed. 305.
Keokuk Bridge Co. vs. Illinois, 161 Ill. 514.
Alexander vs. Thomas, 70 Miss. 570.
Wagoner vs. Loomis, 37 O. St. 571.
Louisville R. R. Co. vs. Commonwealth, 49 S. W. 486.
State vs. West. Union Tel. Co., 165 Mo. 502.
Coulter vs. Ry. Co., 25 Sup. Ct. Rep. 342.

In **Bank vs. Miller** (Cir. Ct. Dist. Ohio), two witnesses testified to a meeting of the state assessors at which the **general understanding was reached** that real estate should be assessed at two-thirds to three-quarters of its value as really representing its true cash value. This action was denied wholly by some and in part by others. The Court said:

> "It is contended for the complainant that this testimony brings the case within the rule of Pelton vs. National Bank, 101 U. S. 143, and Cummings vs. National bank, 101 U. S. 153. That is not our view. In Pelton vs. Nat. Bank it was held that the **systematic and intentional** valuation of all other moneyed

capital by the taxing officer far below its full value, while shares of national banks were assessed at their full value, was a violation of the Act of Congress which prescribes the rule by which they were to be taxed by the state. In that case the court found that the valuation of national bank shares was **intentionally higher** than the valuation of other personal property. * * * In Cummings vs. Nat'l Bank the Supreme Court found that the assessors of real property, the assessors of personal property, and the auditor of Lucas County, Ohio, **concurred in establishing a rule of valuation** by which real and personal property, except money, was assessed at one-third, and money or invested capital at six-tenths of its actual value, and that the assessments on shares of incorporated banks as returned by the state board of equalization for taxation by the auditor of Lucas County were fully equal to their selling price and to their true value in money. * * * It is true, as shown by the testimony, that although the shares of the complainant were valued for taxation at but 86.7 per cent. of their true value in money, they **were valued higher than other personal property,** but the error or inequality is not shown to arise otherwise than from a mistake in judgment on the part of the assessing officers. It would perhaps be more exact to say that the **judgment of the assessors in their official valuation** differs from the **judgment of witnesses in their unofficial valuation** as expressed in their testimony."

It was further distinctly held that discrimination in valuation can afford no relief unless,

> "the officers appointed to make assessments **combine together and establish a rule or principle of valua-**

> **tion,** the necessary result of which is to tax one species of property higher than others and higher than the average rate."

Not only the decision, but the language of the Court, applies with great force to the facts of this case.

In **Louisville Trust Co. vs. Stone,** (Cir. Ct. App. 6th Cir.) it was alleged that there existed a systematic, intentional and illegal under-valuation of other property necessarily effecting an unjust discrimination. The statute of Kentucky authorized the Board to equalize real and personal property at 70 per cent. Complainant alleged that this statute was followed and defendant denied it. It will thus be seen that an obedience to the statute would of itself create a discrimination. Complainant produced the testimony of eight members of local boards of supervisors, twenty-six county clerks, thirty-one sheriffs, twenty-four county judges, one mayor, one magistrate, and one county treasurer: also of certain persons claimed to have appeared before the state board of equalization, also of one member of that board. All this testimony tended to show a valuation generally at not above 70 per cent. Complainant also produced the testimony of a deputy auditor, who undertook to make a comparison between the assessed valuation and the cash value as reported by the clerks of the various county courts for 1895 and 1896. This showed that the assessed value of lands in 114 counties as equalized, was 71.89 per cent. of the sale value. There was also produced a table showing the assessed value of farm lands from 1894 to 1898 inclusive, as equalized, and which showed little variation during the different years. Opposed to this was a large amount of testimony tending to show that the assessments were intended to be made at fair cash value. The Court, speaking through Judge Day, in denying relief and holding that the charge of under-valuation was not sustained by a preponderance of the evidence, said:

> "Every presumption is in favor of the propriety of their action. Errors of judgment on their part will not be enjoined. The proof must be **clear and convincing that a systematic discrimination is being made against complainant before the Federal Court will interfere by injunction with the assessment of taxes and the collection of revenues of the state.**"

A mere statement of the case sufficiently shows that the facts in the Stone case were much stronger than in this case. While in this case no assessing officers were sworn on either side, yet, as remarked in Louisville Trust Co. vs. Stone, all were in fact sworn to assess property at its fair cash value. They are presumed to have done so.

In **Bridge Co. vs. Illinois,** defendant, who was sued for taxes, defended on the ground that other property was assessed at one-third of its cash value, while its property was assessed above cash value. The Court held that defendant's property was not in fact assessed above cash value, and rejected the defense of under-assessment of other property on the ground that there was no sufficient showing of **fraud or conspiracy.**

In **Alexander vs. Thomas,** which was an injunction suit to restrain the collection of taxes on bank stock, it was claimed that complainant's stock was assessed at par, while other property was assessed admittedly at two-thirds of its value. It was held that the bank had no right to complain for the reason that **no conspiracy was shown.**

In **Wagoner vs. Loomis,** complainant had paid the part of the taxes admitted to be due. The assessment complained of was on bank stock valued at par, which was 80 per cent. of its real value. All other property was assessed at 40 per cent. As to the facts the Court said:

> "That a gross, if not scandalous inequality exists between the burden of taxation cast upon bank shares

> and that imposed upon other property in the county of Seneca, is fully established by the records before us. But whether this inequality results from incapacity or a more reprehensible trait in the character of the agents and officers of the law upon whom are imposed the duties of listing and valuing property for taxation, is not disclosed."

It was held that as there was **no showing of conspiracy** or combination, or the **adoption of a rule of action** for the purpose of imposing on some property more than its just share, complainant was not entitled to relief.

In **Louisville R. R. Co. vs. Commonwealth,** which was an action to collect taxes, the defense of under-valuation of other property was made. The statute provided for the assessment of all property generally at 70 per cent. of the transfer value. The railroad franchise was assessed at its fair cash value. It was held that the provision for assessing at 70 per cent. was meant to insure fair cash value and that the railroad had no cause for complaint. The railroad company also objected that some of the officers did not assess up to 70 per cent. The Court held that in the absence of evidence as to fraud or conspiracy, this could not be taken into account.

In **State vs. Western Union Telegraph Co.** (which was an action to recover unpaid taxes), the defense was made that defendant's property was assessed at full value and other property at 35 per cent. or 40 per cent. Defendant introduced the testimony of a member of the state board of equalization that in his judgment property generally throughout the state was assessed at only 35 per cent. or 40 per cent. This was held no defense for the reason that there was no showing of **systematic and intentional** violation of duty as against the presumption that the assessors did their duty, the Court saying:

> "The law contemplates that for purposes of taxation, property shall be assessed at its true cash value

in money, and it also presumes that all officers do their duty. The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct."

In **Coulter vs. Railway Company,** complainant claimed that the general property of the state was valued at 80 per cent., while its franchise was assessed at par. The testimony tended to show that it had been a settled practice for years to assess property at 70 per cent. All the surviving members of the board of equalizers from 1893 to 1896 testified that property was equalized during those years at 70 per cent. of its value. The tax in question was for 1902. There was much evidence that the same condition existed during 1897 and 1898. There was no evidence from the board of equalizers relating to the period from 1899 to 1900. The assessment for 1902 was, however, but a trifle more than for 1891, which the Court below found was but 70 per cent. of real value, and there was much other evidence to the effect that property was equalized at 80 per cent. of the sale price, there being no evidence to the contrary except from a small number of assessors and former members of the board of equalization. This Court held, however, that the testimony was not sufficient to justify a conclusion of fraudulent, general property under-valuation, notwithstanding the natural inclination to think such under-valuation probable; that practice before the adoption of the constitution would not raise a presumption as to practice afterwards; that accidental sales in a given year might be a misleading guide to average values, and the decree of the Court below which had granted relief, was reversed.

The evidence of general property under-valuation in the Coulter case was many times stronger than here presented.

We have failed to find that any case has ever been presented to this Court justifying relief against taxation, other

than of national bank shares, on account of general property under-valuation.

We submit that appellant has entirely failed to prove such an under-valuation of general properties in the 1902 assessment as entitles it to complain.

II.

UNDER-VALUATION OF APPELLANT'S RAILROAD PROPERTIES.

Appellant's railroad property was substantially under-valued by the State Board of Assessors in the 1902 assessment thereof. This under-valuation was greater than the claimed general property under-valuation.

FIRST.

THE RULE OF EVIDENCE.

It was competent for the defendant to show that appellant's railroad property was under-assessed by the State Board of Assessors in 1902, without proving that such under-valuation was fraudulent or intentional.

The evidence presented by defendant in support of the proposition that appellant's railroad property was in fact under-valued by the State Board of Assessosrs in 1902, was objected to by appellant as incompetent and immaterial, and motion has been made, upon the like grounds, to strike out all testimony of such under-valuation, the reason assigned for the objection being that the assessment of the railroad property cannot be reviewed without a showing that the State Board of Assessors in making an under-assessment, acted fraudulently, and that no proof of such fraud has been given.

We submit that for the purposes for which this inquiry is had, the question of railroad under-valuation is not only material, but is absolutely necessary to be determined, and wholly regardless of the question of the good faith or bad faith of the Board of Assessors.

Prejudicial discrimination the basis of right to relief. The basis of appellant's claim to relief is not merely that the general properties of the state are fraudulently under-valued. Proof

of such fact alone would not give the right to relief. To make a case entitling appellant to relief, it must show, **first,** that the general properties of the state were **in fact** under-valued; **second,** that such under-valuation was fraudulent; and, **third,** that such under-valuation has resulted to appellant's prejudice from the fact that its property has been actually assessed at a higher rate than the general properties of the state. It is only the **second** of the three facts necessary to be shown which involves fraud. Unless co plainant's properties have been so actually assessed at a higher percentage of value than the general properties of the state, complainant, is not prejudiced; and without such prejudice equitable relief cannot be had, even though the assessment of the general properties of the state is shown to have been fraudulent. This prejudicial discrimination is the basis upon which relief has been asked, and the right to the same considered, in all the adjudicated cases of alleged discrimination.

Pelton vs. Nat'l Bank, 101 U. S. 143.
Cummings vs. Nat'l Bank, 101 U. S. 153.
First Nat'l Bank vs. Lucas County, 25 Fed. 749.
Taylor vs. L. & N. Ry. Co., 31 C. C. A. 537.
Chicago Union Traction Co. vs. Board of Equalization, 114 Fed. 557.
Railway Co. vs. Coulter, 131 Fed. 282.
Coulter vs. Ry. Co., 25 Sup. Ct. Rep. 342.
Bureau County vs. Railroad Co., 44 Ill. 229.
Railroad Co. vs. Commissioners, 54 Kas. 781.
Randall vs. Bridgeport, 63 Conn. 321.
Ex parte Bridge Co., 62 Ark. 461.
Bank vs. Miller, 19 Fed. 372.
Louisville Trust Co. vs. Stone, 107 Fed. 305.
Keokuk Bridge Co. vs. Ill., 161 Ill. 514.
Alexander vs. Thomas, 70 Miss. 517.
Wagoner vs. Loomis, 37 Ohio St. 571.

Louisville Ry. Co. vs. Commonwealth, 49 S. W. 486.

State vs. West. Union Tel. Co., 165 Mo. 502.

Southern Railway Co. vs. N. Carolina Corp. Com., 104 Fed. 700.

Railroad & Telephone Cos. vs. B'd of Equalizers, 85 Fed. 302.

Thus, in Louisville Railway Co. vs. Commonwealth, Taylor vs. L. & N. Ry. Co., Coulter vs. Railway Co., Railroad Co. vs. Commissioners, Randall vs. Bridgeport, ex parte Bridge Co., Cummings vs. Nat'l Bank, First Nat'l Bank vs. Lucas County, State vs. Western Union Tel. Co., Southern Railway Co. vs. North Carolina Corporation Commission, and Railroad and Telephone Cos. vs. Board of Equalizers, the property of the respective complainants was alleged to have been assessed at par, while general property was alleged to have been assessed at below value.

In **Pelton vs. National Bank** the claim was made that the property in question was assessed from 50 per cent. to 60 per cent. above other moneyed capital.

In **Bureau County vs. Railroad Co.** the claim was made that property in general was assessed at one-fifth to one-third its value, and that of the railroad much higher, although not necessarily at 100 per cent.

In **Bank vs. Miller,** real and personal property, except money, was alleged to be assessed at one-third, money and invested capital at six-tenths of its actual value, and complainant's property at 86.7 per cent.

In **Bridge Co. vs. Illinois** it was claimed that while general property was assessed at but one-third of its cash value, complainant's property was above its full value.

In **Wagoner vs. Loomis** the assessment complained of was alleged to be at 80 per cent. of the real value of the property,

while other property was alleged to have been assessed at 40 per cent.

All these cases, as well as all others which we have examined, recognize and assert the doctrine that the property as to which relief is sought, must be shown to have been assessed on some basis higher than that adopted for the property alleged to have been fraudulently under-valued, whether that higher basis be 100 per cent. of value, or a greater or less per cent. than 100.

It is too plain to require argument that unless appellant has been injured in fact it has no standing in this proceeding. Where the statute requires all assessments to be at cash value and some are below that value, injury and discrimination result as to those assessed above the latter value. If, however, notwithstanding the violation of the statute, both are on the same plane, no injury results. As stated by Mr. Judson:

> "It is obviously immaterial what the basis of valuation is if it is uniform as to all property within the territory, or as to the class of subjects upon which the tax is laid. This is recognized in the requirement of state constitutions that taxation shall be uniform upon the same class of subjects within the territorial limits of the authority imposing it. Thus, if all the property in the state were valued on the same basis, it would be immaterial to the individual taxpayer whether he paid 1 per cent. on a valuation of 100 cents, or 2 per cent. on a valuation of 50 cents, or 4 per cent. on a valuation of 25 cents."
>
> Judson on Taxation, Sec. 463, p. 609.
>
> Williams vs. Mears, 61 Mich. 87.
>
> Canfield vs. Bayfield Co., 74 Wis. 60.

The burden of proof of prejudicial discrimination is on complainant. The injury, namely, the prejudicial discrimination, is a part of complainant's case. Every element neces-

sary to constitute it must appear, and must be clearly alleged and proven. The rule is well settled that to entitle a complainant to an injunction restraining the collection of a tax it must appear that its collection would be inequitable or unjust.

Mercantile Nat'l Bank vs. Hubbard, 98 Fed. 465, 469.

Cooley on Taxation (3rd Ed.) 1443 and cases cited.

It necessarily follows that to entitle appellant to relief it must show not only the failure to assess other property than its own at cash value, but that by reason of the under-assessments, it has been made in fact to pay more than its just share of the tax.

Cooley on Taxation (3rd Ed.) 751, 752.
Muskegon vs. Boyce, 123 Mich. 540.
Wagoner vs. Loomis, 37 Ohio St. 582.
Moss vs. Cummings, 44 Mich, 361.

In Cooley on Taxation it is said:

> "And in no proceeding is one to be heard who complains of a valuation which, however erroneous it may be, charges him only with a just proportion of the tax. If his assessment is not out of proportion with valuations generally on the same roll, it is immaterial that some one neighbor is assessed too little and another too much. This is a rule which has been applied when assessors are found to have systematically under-stated all the property in their district though the statute in most positive terms required an assessment at cash value. The wrong of a disregard of a statute in such a case is a public and not a private wrong."

In **Muskegon vs. Boyce** (supra) it was said:

> "It is quite possible that the value placed on the property by the assessing officers was low. It is also

probable that property which ought to have found its way to the assessment roll was not assessed. But that of itself is not sufficient to allow a taxpayer to escape from taxation. It must be made to appear that because of these things he is **made to pay more than his proportion of taxes.** * * *It is not at all clear that defendant ought not to have been assessed more than he was, or that he was not assessed as low proportionately as anyone else."

In **Wagoner vs. Loomis** (supra), which was a case of alleged fraudulent assessment of other property, it was said:

"Equity will not afford relief to a complainant who cannot show that the burden imposed on him is greater than it would have been if the laws had been faithfully executed by taxing all property by a uniform rule and according to its true value in money."

Where, in a suit to recover taxes, defendant's assessments were at one-third off, but at the same ratio to value as the other property on the roll, he was held not entitled to relief.

State vs. Thayer, 69 Minn. 170, 174.
People vs. Van Nostrand, 24 N. Y. Suppl. 513.

As applied to this case: Should it be established that the general properties of the state were assessed in 1902 at but 82.4 per cent. of their real value, yet unless the railroad properties were assessed at a higher percentage of value than 82.4 per cent. complainants are not entitled to relief on the score of under-valuation.

It would be inequitable and unreasonable to raise, for the purposes of this inquiry, the valuation of the general properties of the state if complainant's property is already valued upon the same basis.

Appellant seeks to meet the force of the fact that the

burden is upon it to show a discrimination to its prejudice by the proposition that the assessments of the railroad companies as made by the State Board of Assessors are presumed to have been at cash value, and that this presumption is conclusive, in the absence of proof of fraud in making the assessments, and that appellant has therefore sustained the burden of proof when it shows the fact of such assessment of its own property. Conceding the existence of the presumption, in the absence of proof to the contrary, that the railroad properties were assessed at cash value, the question of the relation of those assessments to actual value is merely a question of evidence.

The presumption that assessments are equal is manifestly stronger than that they are at cash value, as the dominant idea in the constitutional provisions invoked in complaints of discrimination is uniformity and equality. The entire taxing system of the state is based upon the equality of assessments, and where it appears in any case that part of a class is assessed below value, it is naturally presumed that all assessments were upon the same basis, and therefore that equality and lack of consequent injury existed. This presumption is especially strong under the Michigan system, which confers upon tax commissioners full control over every assessment of general property of the state, and at the same time upon the state board of assessors, whose members are also tax commissioners, sole authority over the assessments of railroad properties. This presumption of equality is of itself sufficient to overcome appellant's proposition.

We concede that the action of the State Board of Assessors so far as it relates to the assessing and fixing of the tax as a judgment against the one assessed, is conclusive in the absence of fraud.

Defendant is not, however, attempting either directly or indirectly, to attack the judgment or amount of the assess-

ment, or to compel appellant to pay more than the tax assessed against it. On the contrary, defendant insists that the assessment made and the judgment entered by the State Board of Assessors against the appellant shall stand, and that appellant shall pay the taxes fixed by it. The appellant, on the other hand, is the one who attacks the assessment made by the State Board of Assessors, and for the purpose of avoiding, in part, the tax assessed against it, assails the state taxing system as applied by that Board and the other assessing officers in the state, and puts in question the issue of the undervaluation of its railroad property by alleging that other property is assessed below value. It thus opens the inquiry into the nature of the assessment of its own property, and submits to the equitable discretion of the Court which it has invoked, the question of whether or not it is being called upon to bear more than its just share of the public burden. This question, therefore, does not rest on presumption of assessment at cash value. The question is, what is the value of complainant's property, and what relation does the assessment placed on it bear to the assessments placed upon other property in the state?

The complainant is in a court of equity, and by its bill it has offered to do what it is required to do as a condition of relief, namely, to pay its just share of the public burden. In none of the cases where a fraudulent under-valuation of other property is made the basis of relief to the complaining party, has the defendant been required to show fraud in the making of the assessment complained of in order to permit an inquiry into that assessment. In fact, the cases recognize the contrary rule. For example:

In **L. & N. Ry. Co. vs. Coulter** (supra), the assessing board members testified to a valuation of the railroad property at cash value. The Circuit Court, after reaching a conclusion that the general property of the state was assessed at 80

per cent. of its value, entered into the question of the value of the railroad property, saying:

> "But in order that complainant may be entitled to the relief which it seeks, it is not sufficient that such be the fact. It is essential that its property in this state should have been valued by the board of valuation and assessment at its full, fair cash value, in the process of determining the amount at which its intangible property should be assessed. Here complainant and defendant exchange positions. The former contends that said property was so valued, the latter that it was not. This dispute, therefore, demands settlement at our hands." (131 Fed. at p. 303.)

No proposition of fraud in connection with the valuation of the railroad property was involved.

The same principle was recognized by this Court in its consideration of the same case on review.

Coulter vs. Railway Co., 25 Sup. Ct. Rep. 342.

The same principle is impliedly recognized in Muskegon vs. Boyce, from which we have quoted above; also in Railroad and Telephone Cos. vs. B'd of Equalizers, and Southern Railway Co. vs. N. Carolina Corporation Commission (supra.)

We know of no case asserting a contrary doctrine. The case of Lowell vs. County Commissioners, 3 Allen 549, cited below by appellant's counsel, has no such application. The proposition that an alleged under-valuation of one piece of property of a complainant tax-payer cannot be set off against an over-valuation of another piece belonging to the same tax-payer, has no relation to the proposition here involved.

How discrimination corrected. A consideration of the method of relief to which complainant would be entitled upon a finding of a fraudulent under-valuation of the general properties of the state, shows conclusively the correctness of

the proposition that fraud in the making of the railroad assessments is not necessary to be shown.

The assessment against the appellant consists of two features—**first**, an appraisement of value; and **second**, the rate of taxation determined mathematically by the commissioners by reference to taxes paid upon other property. The product of these two elements makes the tax or judgment. The ratio of discrimination depends on the ratio of assessed valuation in the one to that in the other class.

Judson on Taxation, Sec. 467, pp. 613, 614.

The equalization in cases of discrimination may be accomplished either by reducing the property of appellant to the same basis of valuation borne by other property, or by changing the rate of taxation made necessary to meet a proved discrimination. Neither of these methods is exclusive. The raising, for the purpose, of the value of appellant's property, does not make a greater judgment than that entered by the State Board of Assessors. It merely fixes a sum not greater than the amount of the judgment collected by the State Board of Assessors, which appellant is required to pay as a condition of receiving equity.

But an adjustment of the valuation of complainant's property means merely an adjustment of the rate of taxation, which is the very thing of which appellant complains.

The average rate of taxation for 1902 as imposed upon railroad property was $16.55 on each thousand dollars. It is appellant's theory that the general properties of the state were assessed at but 82.4 per cent. of their real value, and that this rate should therefore be but 13.68 per thousand. This is the proposition stated by appellant in its bill. (R. pp. 3-5.)

The valuation of general property is attacked by appellant only as, and because it affects the average rate of taxation assessed upon its property. If, however, complainant's prop-

erty is assessed at but 82.4 per cent. of its value, confessedly it should pay the same average rate of $16.55 per thousand.

For further illustration—if the general property of the state should be found to be assessed at 90 per cent. of its real value, and the railroad property at 95 per cent. of its value, complainant should pay such percentage of $16.55 per thousand dollars of valuation as 95 per cent. bears to 90 per cent., namely, about 94 per cent.

The entire question resolves itself into a determination of what proportion (if not the whole) of the average rate of $16.55 per thousand the appellant is required to pay.

We submit that appellant's objection to the testimony of under-valuation of the railroad properties is not well taken and that fraudulent conduct on the part of the State Board of Assessors is not necessary to be shown in order to entitle defendant to the benefit of actual under-valuation of appellant's railway property.

SECOND.

The assessment of appellant's railroad property did not in fact represent the good faith judgment of the State Board of Assessors.

The answer as originally filed denied that the assessment of appellant's railroad property was at its true and actual cash value. Since the testimony was taken the answer was amended by leave of the Court, by adding an averment that the assessment of appellant's railroad property as appearing on the assessment roll, is not at, and does not represent the true cash value of said property, but that such assessment is at an amount much below its true and actual cash value, and that "the said assessment and tax rolls and the said assessment of the property of the said complainant appearing thereon do not express or represent the true and honest judgment of the State Board of Assessors, or the true and honest judgment of its several members; that he believes and charges

the truth to be that the said under-assessment of the property of the said complainant by the said State Board of Assessors is not the result of inadvertence, mistake or accident, but that such under-assessment and under-valuation was intentionally and wilfully made." (R. p. 57.)

A suggestion that because the answer before its amendment contained an admission (R. p. 35) that the assessment of appellant's railroad property on the assessment rolls "was found" by the members of the State Board of Assessors" to be the true cash value of the property of said complainant, and the full and actual value thereof," (coupled with an explicit denial that the assessment was in fact at actual cash value, but without an allegation that the assessors acted in either good faith or bad faith in making the assessment), an express admission of the good faith of the assessors resulted, notwithstanding the express statement to the contrary in the amendment, can hardly be taken seriously.

We submit the testimony in the case sustains the allegation that appellant's railroad property was intentionally assessed below the judgment of the members of the State Board of Assessors.

It is not claimed by defendant that railroad properties generally were substantially under-valued in the 1902 assessment, but that the properties of appellant and the Pere Marquette Railroad were so under-valued, is clear. As these two roads were apparently treated together and in the same spirit, it will be necessary, in discussing this one feature, to include the case of the Pere Marquette, although that Road has not appealed to this Court.

An official appraisement of the railroad properties of the state was made under the auspices of the Michigan State Tax Commission as of November, 1900. Prof. M. E. Cooley, Dean of the Department of Engineering of the University of Michigan, and a large staff of civil and mechanical engineers, con-

ducting the physical appraisal, and Prof. H. C. Adams, Professor of Political Economy and Finance at the same institution, and Statistician of the Interstate Commerce Commission, making the non-physical appraisal. This appraisement is known officially as the Michigan Railway Appraisal. (R. pp. 346-7, 489, 500.)

The 1900 appraisements of the Michigan railroad properties, both physical, non-physical, and total, appear on sheet "739a" following page 544 of the Transcript of Record.

When the State Board of Assessors met for the purpose of making the assessments of railway properties for 1902, it had before it the Michigan Railway Appraisal of 1900 referred to, which showed in the case of the Michigan Central, a physical valuation of over 35 millions, and a toal valuation (physical and non-physical) of more than 49 millions, and in the case of the Pere Marquette, a physical valuation of 28 millions, and a total valuation of more than 31 millions.

Table "739a" following p. 544 of Record.
Also p. 636 of Record.

The Board had also before it the reports of the railroads showing the largest business and the greatest profits within their history up to that time.

It was thus fair to expect that the values of these roads would be greater than in 1900. Indeed, the railway reports so showed.

Mr. Walker, the engineer of the State Board of Assessors, presented to the Board at this time his computations of the values of the railroad properties of the various roads based upon a critical examination of their reports. He capitalized the net earnings of both these roads at a rate of 5.65 per cent., and after making some deductions, recommended to the State Board of Assessors that the Michigan Central Railroad property **in Michigan** be assessed at 57 millions (reduced by real

estate locally assessed to $56,252,000), and that of the Pere Marquette at upwards of 36 millions.

Record pp. 634, 635.

The Board also had before it computations on the Stock and Bond plan (R. 637), and considered several different plans, including capitalization of earnings, and appraisals supplemented by capitalization of final net surplus. (R. p. 639.)

The result of all these computations and considerations was that in advance of the review the State Board of Assessors, after themselves taking part in the making of computations, prepared an "Official preliminary list of values" of railroad properties, and in that appraisal put the valuation of the Michigan Central at 60 millions and that of the Pere Marquette at 38 millions. (R. pp. 637, 638.)

A comparison of the Cooley and Adams, or Michigan Railway Appraisal of 1900, with the State Board's assessments of 1902 shows that the Michigan Central and the Pere Marquette were the only prominent roads in the state whose 1902 State Board assessments were less than those contained in the 1900 Michigan Railway Appraisal.

Table "739a" following p. 544 of Record.

The following comparison of the assessments of the six prominent roads referred to as contained in the 1900 Michigan Railway Appraisal, the 1902 State Board assessment, and the 1903 assessment by the same Board, emphasize the discrimination made in 1902 in favor of the Michigan Central and Pere Marquette and the practical confession of that discrimination contained in the 1903 assessment, which was made after the commencement of this litigation and after the 1902 assessments of the Michigan Central and Pere Marquette roads had been subjected to public scrutiny,—it being the undisputed testimony of engineer Walker that these large increases in the cases of the Michigan Central and Pere Marquette railroads, respectively, are "not accounted for by any

increase in the value of the property between the assessments." (R. p. 636.)

Name of Road.	1900 Mich. Ry. Appraisal.	1902 St.B'd Assessment.	1903 St.B'd Assessment.
Ann Arbor System.....	$ 6,392,388	$ 7,582,000	$ 7,600,000
G. R. & I. System.....	10,544,790	11,500,000	12,000,000
Grand Trunk System....	22,157,703	23,195,000	24,081,000
Lake Shore System.....	14,492,977	18,000,000	17,000,000
Michigan Central System	49,633,417	45,000,000	55,400,000
Pere Marquette System..	31,734,584	26,000,000	37,500,000

The following table presents an interesting comparison between the 1900 Michigan Railway Appraisal, the 1902 valuation made by the engineer of the State Board of Assessors, the 1902 State Board Assessment, and the 1903 assessments of that Board, so far as these various assessments and appraisals pertain to the **Michigan portions** of the Michigan Central and Pere Marquette roads:

Michigan Central.

1900 Michigan Railway Appraisal.....	$49,663,417
1902 Appraisal by Engineer Walker.....	56,252,000
1902 State Board Assessment.....	**45,000,000**
1903 State Board Assessment.....	55,400,000

Pere Marquette.

1900 Michigan Railway Appraisal.....	$31,734,584
1902 Appraisal by Engineer Walker.....	36,270,000
1902 State Board Assessment.....	**26,000,000**
1903 State Board Assessment.....	37,500,000

This situation naturally calls for explanation. The only explanation contained in the record and presented to this Court, is this:

The State Board of Assessors consisted of five members, namely, Messrs. Freeman, Sayre, McLaughlin, Dust and Jenks.

When the Board met to finally fix the assessments, Com-

missioner Sayre insisted on putting the Pere Marquette at only 22 millions, being **more than 6 millions below the physical valuation** of that road in 1900, besides laying out of question not only the franchise value contained in the appraisal of that year, but also the great increase of value since that time. Commissioner Freeman advocated 46 millions as the valuation for the Michigan Central.

(Dust's Test., R. p. 443.)

Dust's judgment of the value of the Michigan Central was 51 or 52 millions, and that of the Pere Marquette 36 millions. (Dust's Test., R. p. 439.)

McLaughlin's judgment of the value of the Michigan Central was 55 millions and of the Pere Marquette 35 millions. (McLaughlin's Test., R. p. 432.)

The views of Mr. Jenks are not given in the record, as his term was about to expire and he was not present when the review was finally closed. We can only infer what his judgment was as to the value of these roads from the testimony of Mr. Dust that Mr. Sayre practically threatened Mr. Jenks with a failure to receive re-appointment and apparently upon the ground that he was not favorable to keeping down the valuations of the roads. Mr. Sayre does not deny making the remark atributed to him from which the inference stated above is drawn. (Dust's Test., R. p. 440; McLaughlin's Test., R. p. 433.)

It is the testimony of Engineer Walker that Commissioner Freeman was anxious to cut down the valuation of the Michigan Central, and Commissioner Sayre equally anxious to cut down that of the Pere Marquette; that these two Commissioners showed more anxiety about reaching low values for these two railroads than any other roads; that their valuations on those properties seemed fixed in advance, and that during the entire assessment there was an effort made by Assessors Freeman and Sayre to secure the assessment of those proper-

ties at or near the figures first announced by them. He testified that Mr. Freeman stated in his presence that "The power of these great corporations could not be neglected." (Walker's Test., R. pp. 638-9.)

Mr. McLaughlin testifies that Mr. Sayre seemed more anxious for a reduction of the Pere Marquette than the other members, and says that Mr. Sayre insisted that the valuations which the Board was about to place were higher than the railroads would stand, and at one time made to Mr. McLaughlin the remarkable suggestion that he (Sayre) could find out what assessments the railroads would be **satisfied to pay upon** without litigation, and asked Mr. McLaughlin if he wished him to find out. (R. p. 433.)

That the valuations finally agreed upon did not represent the judgment of either Mr. McLaughlin or Mr. Dust, is plainly stated by them. Mr. McLaughlin says (referring to the proposed valuation of the Michigan Central): "The 46 millions did not represent my judgment. My judgment was it should be higher, and the 45 millions finally fixed was still more remote from my best judgment." (McLaughlin's Test., R. p. 434.)

He further states that his opinion was that he Pere Marquette should have been valued in the neighborhood of 35 millions. (R. p. 432.)

Mr. Dust says that from the experience had and investigation made, the assessments of both the Pere Marquette and the Michigan Central in 1902 were too low. (R. p. 440.)

That Commissioners Freeman and Sayre were convinced of that fact at least as early as 1903, seems apparent from the assessments made that year.

The 1902 appraisal of the Michigan portions of the Railway properties of the Michigan Central and Pere Marquette Railroads does not seem to have been even the result of a fair compromise of views. The valuations insisted upon by

Messrs. Sayre and Freeman respectively, were, under all the circumstances referred to, lower than seems consistent with good faith judgment. The two other members of the Board who finally agreed to the low valuations seem to have done so through great pressure, and as a matter of necessity to the reaching of any agreement whatever. The attitude of Commissioners Freeman and Sayre toward these two Railroad Companies is indicated by their connection with this cause, especially in the voluntary making of affidavits to be attached to the bills of complaint therein as basis for an injunction restraining the collection of the revenues of the state, with the assessment of which they were entrusted.

See Exs. A. & B attached to Bill of Complaint herein, R. pp. 21, 24.

They made these affidavits at the request of the attorney of one of the railroads, with the knowledge that both Commissioners Dust and McLaughlin had refused to make such affidavits, and without consulting anyone connected with the State administration as to the propriety of their so doing, except that after the affidavits were made, and they learned that Dust and McLaughlin had refused to make an affidavit, they asked that they be held up for a short time, during which the opinion of the Railroad Commissioner was asked by Mr. Freeman.

Freeman's Test., R. pp. 138, 139.
Sayre's Test., R. p. 150.

It is fairly inferable from the record that the argument of Mr. Sayre that the railroad assessments should be reduced to as low a percentage of value as in the opinion of Commissioners Freeman and Sayre the general properties of the state were assessed at, was, in connection with the other arguments and the pressure referred to, controlling.

It is noticeable that the assessments as made were less than 82 per cent. of the appraisals made by the Engineer of

the Board of Assessors, in the making of which he testifies that he followed the plan adopted by the Board.

The record presented to this Court contains no testimony on the part of either Messrs. Freeman or Sayre in dispute of the testimony of the other Commissioners referred to herein.

While we insist that the real value of appellant's railroad properties is open to inquiry herein, without proving fraud in the making of the assessment, we submit that it appears from the record that the assessment in question did not in fact represent the real judgment of the members of that Board and that the properties referred to were purposefully under-valued.

There is no occasion to attribute corrupt motives to any member of the State Board of Assessors. What has been written is not intended so to do. Whatever may have been the motive for an appraisement below real, honest judgment, whether a desire to assess on a supposed basis of the assessment of the general properties of the state, whether fear of litigation or otherwise, such purposeful under-valuation was "intentional and therefore fraudulent" in law.

THIRD.

Appellant's Railroad Property was in Fact Substantially Under-valued in the 1902 Assessment.

1. **General condition of Michigan Central System.**

The following facts are important in determining the value of appellant's railroad properties.

a. **The Michigan Central System consists** of the main line of the Michigan Central railroad proper, extending from Detroit to Chicago, and fourteen subsidiary companies whose lines lie in Michigan, Canada, Illinois, Indiana and Ohio. A list of these subsidiary companies appears in schedule "739a" following page 544 of the Transcript of the Record.

The Michigan Central Railroad Company owns none of

these subsidiary lines entire. It controls them for the most part either by lease or by operating contract, as in the case of the Canada Southern. The latter road owns the stock of the Michigan, Midland & Canada, and the Toledo, Canada Southern & Detroit railroads. The Michigan Central Railroad owns large amounts of the stock and bonds of many of its subsidiary companies. (Thompson's Test., R. p. 598, Schedule "831a" following p. 596.)

The total mileage of the system aggregates 1657.74 miles.

The Michigan mileage is 68.56202 per cent. of the system, or 1136.58 miles. (Thompson, R. p. 598.)

b. **The physical valuation, and a comparison between that valuation and bond values.** The cost of reproducing the physical properties of the railroads comprising the Michigan Central system on April 15, 1902 (being the date as of which the assessment in question is made), is shown by the undisputed testimony of Prof. Mortimer E. Cooley, Dean of the Department of Enigineering of the University of Michigan, and of a large number of civil and mechanical engineers who, under the direction and supervision of said Cooley, made the appraisal not only of the railroads in the Michigan Central system, but of the other railroads taxable in Michigan. The cost of reproducing the Michigan portion of the physical properties of railroads comprising the Michigan Central system, after making proper deductions on account of depreciation from use and wear, is shown to be (exclusive of cash and supplies) $43,151,815

The cash and supplies on hand (Michigan portion) at the last named date amounted to..... 2,959,196

Total Michigan portion physical properties, cash and supplies $46,111,011

See admission as to "Physical appraisal of Railroad properties," R. p. 489.

Schedule "739a" following p. 544.
Thompson's Test., p. 612.

Not only is there nothing to impugn this physical valuation, but the undisputed testimony of Engineer Walker of the Michigan State Board of Assessors is that it is too low. He shows that the appellant's report to the Board of Assessors shows the cost of the physical properties to June 30, 1902, to be $45,191,755. He adds that "These figures shown in the book of accumulative cost would be higher except that the Company charges **permanent improvements to operating expenses.**" (R. p. 614.)

Treasurer Cox of the appellant railroad corroborates this statement, saying: "If the Michigan Central were built today on the basis of present appliances it would cost much more than if built twenty years ago with the appliances then in use, and probably **much more than appears on the books to be its cost,** as we have **paid for many changes out of earnings** instead of capital." (R. p. 658.)

As to the general condition of the Michigan Central system, Treasurer Cox says: "The Michigan Central stands conspicuous among Michigan railroads for the high quality of its equipment, track, right of way, numerous improvements, and the high grade in which the road and its stock is kept up. I know of no other road in Michigan which compares with it favorably in that respect. While there have been years when we have let the property run down, **taking all the years together, the process of betterment has been steadily going on.** It is a part of the Vanderbilt system of operating roads to bring them to as high a state of efficiency as possible; that idea has been applied to the Michigan Central." (R. p. 658.)

There is nothing to the contrary of this testimony as to the physical valuation and general high grade of appellant's railroad properties.

Physical valuation as compared with bonds. In this discussion and in the valuations of appellant's railroad properties no account will be taken of bonds held by either the Michigan Central Railroad Company or any of its constituent companies.

The fact of the bonds held by the general public April 15, 1902, was.....$43,049,000
The market value of the bonds held by the general public was..... 46,357,000
The unfunded debt was..... 3,621,056

This latter amount added to the face of the bonds makes the par value of the indebtedness held by the general public, $46,670,056; or, added to the market value of the bonds so held, makes an aggeegate of $49,978,056.

The comparison between the physical values and the bond values is significant. The total bond issue on the entire system (aside from nearly $3,000,000 of bonds on subsidiary lines owned by Michigan Central and Canada Southern—831a) is thus substantially the same as the physical valuation of the Michigan portion only, which is but about 68 per cent. of that of the entire system. This leaves out of physical values alone, regardless of non-physical element, a stock value of many millions of dollars.

c. **Michigan Central stocks and their market value.** With respect to stocks also no consideration is had or account taken of stocks held by the parent company. The only stocks which are important to be considered here are the stock of the Michigan Central Railroad Company proper, and of the Canada Southern. The Michigan Central stock (par) in the hands of the public on April 15, 1902, was.....$18,738,000
The Canada Southern stock (par) in the hands of the public was..... 15,000,000

This appears by schedule "831a" following page 596 of the Transcript of Record.

the Michigan Central Railroad that for the five year period from 1898 to 1902, both inclusive, the average net earnings per year over the entire system **after the payment of taxes,** was $3,620,377, and of the Michigan portion, $2,503,345. The net earnings for the Michigan portion for the year 1902 were above the average for the five year period, being (after payment of taxes), $2,516,050. (See Tables, R. pp. 510, 511.)

Complainant's expert witness, Prof. Johnson, of the University of Pennsylvania, corrected the reported net earnings for the ten year period from 1893 to 1902, both inilusive, by adding certain sums admittedly paid from operating expenses on account of permanent additions, and made the average for the ten year period, before payment of taxes, for the entire system, $4,268,462.75, and for the Michigan proportion, $2,923,-896.98. (R. p. 671.)

g. **Permanent improvements paid from operating expense.** The net earnings referred to are so shown after including in operating expense payments for betterments and additions, as shown by the testimony of, and schedules furnished by Clerk Comstock of the Michigan Central Auditor's office, amounting from 1898 to 1902, to $5,198,012.72, or an average per year paid from operating expense on account of betterments and additions, $1,039,602.54. The additions alone (excluding betterments) were, during the five year period named, $1,829,771.81, or an average on account of additions alone, paid from operating expense, per year, $365,954.36. (Comstock's Test., R. pp. 678-690: Prof. Adams' Test., R. p. 805.)

Reference to the schedule on page 805 shows that the payments on account of betterments and additions have steadily increased from 1898 to 1902.

The **report of the Michigan Central Railroad** shows that in 1902 it was able to pay $1,383,939.22 for permanent improvements from operating expense, to charge against net

income for improvements, $210,000, to pay 4 per cent. on its stock and interest on its bonds, and still pass $141,646.21 to surplus. (Test. of Engineer Walker, R. p. 634.)

This testimony is entirely undisputed.

The Interstate Commerce Commission, in an advance rate case, found, upon testimony presented by the Michigan Central Railroad, that this Road charged improvements to operating expense as follows: In 1900, $1,101,271; in 1901, $1,181,618; in 1902, $1,383,939. (Test. of Statistician Adams, R. pp. 499, 530.)

h. **Operating expense. Ratio as affected by charging additions and betterments thereto.** The result of this system of charging betterments and additions to operating expense was that the Michigan Central operating expense from 1898 to 1902 ranged from 72.99 per cent. of its gross earnings in 1898 to 76.93 per cent. in 1902, there being a marked increase during the last three years over the two former years of that period.

As showing the comparison between the Michigan Central operating expense ratio with that of other roads, a table has been prepared by Statistician Adams, found on page 508 of the Transcript of Record. By this it appears that as contrasted with the Michigan Central operating expense, the average of Group 3 (which includes Ohio, Indiana, the southern peninsula of Michigan, small portions of Illinois, Pennsylvania and New York)—the operating expense of which group is among the highest in the country—for the same years 1898 to 1902, inclusive, ranged from 71.18 per cent. in the first year to 69.49 per cent. in the latter year; that the average of Group 6 (which embraces A., T. & S. F., C. & A., C. & N. W., Chi., B. & O., Chi., M. & St. P., Chi., R. I. & P., Great Northern and Illinois Central), ranged from 62.17 per cent. in 1898 to 61.48 per cent. in 1902; and that of the entire United States from 65.58 per cent. in 1898 to 64.66 per cent. in 1902.

It thus appears that the ratio of operating expense of the strong, well equipped and prosperous Michigan Central Railroad is the largest shown in the table presented, except that of the confessedly poor Ann Arbor road, and that for the last three years in the period taken, the Michigan Central ratio of operating expense was the largest of any road shown, and that while in the case of the other groups, and in the average of the entire United States the ratio of operating expense lessened as traffic increased, in the case of the Michigan Central it rapidly increased, even in advance of the increase in its traffic.

That this condition (and thus the smaller net earnings reported) is due entirely to the practice of charging permanent improvements to operating expenses, further appears from the following considerations:

It appears by the undisputed testimony of Statistician Adams and Clarence H. Wildes that a normal operating expense is under 70 per cent., and by the testimony of Engineer Walker that the Michigan Central operating expenses have been assigned arbitrarily and out of proportion to the business done. (Prof. Adams' Test., R. p. 500; Wildes' Test., R. p. 575; Walker's Test., R. p. 631.)

Not only does the table referred to on page 508 of the Transcript of Record so show, but the proposition is further fortified to a demonstration by the table presented by Prof. Cooley and found on page 819 of the Transcript of Record, by which it appears that excluding from the Michigan Central operating expense (from 1893 to 1902) both taxes and betterments (column 10) the ratio is still larger every year since 1894 than the average in the entire United States, **including taxes** (column 14), and that the Michigan Central operating expense, **including taxes** (column 8), and excluding betterments, is larger every year beginning with 1895 than the average of Group 3 (column 13).

i. **Dividends paid by appellant.** From 1890 to 1892 the Michigan Central Railroad paid 5 per cent. dividends; from 1892 to 1894, 5½ per cent; from 1894 to 1902, 4 per cent. (Adams' Test., R. p. 509.)

Reference to the table of net earnings from 1893 to 1902 thus shows that as the **net earnings** have **increased** (even in spite of their depression from the practice of charging betterments and additions to operating expense) the **dividends** have **decreased.** The reason for this clearly appears from the testimony of banker Wildes as to his conversations with President Ledyard and the latter's admissions of the real value of the stock and his proposition to pay larger dividends later, presumably when the remaining minority stock is bought in. (Wildes' Test., R. pp. 575, 576.)

For several years the Canada Southern has paid 2½ per cent. dividends. (Thompson, R. pp. 597, 598.)

These dividends have likewise been depressed by the system of charging betterments and additions to operating expense.

See Tables presented by Auditor's clerk Comstock, R. pp. 685-690.

For at least the last two or three years before 1902, and including that year, the reports of the Michigan Central Railroad to its stockholders showed that notwithstanding it had paid from 75 per cent. to 81 per cent. of its gross earnings for so-called operating expenses (R. p. 651) it had earned net about 6 per cent. (Cox, R. pp. 652-658; Marwick, R. p. 652.)

In fact, if the net earnings were corrected on account of betterments and additions charged in operating expenses, the surplus **above the reported 6 per cent. net earnings** would range, in the case of the Michigan Central, from 1.8 per cent. in 1898 to 5 per cent. in 1902, and in the case of the Canada Southern, from a fraction of 1 per cent. in 1898 to 4.6 per cent.

in 1901, and 3.5 per cent. in 1902. This appears by the table on page 805 of the Record.

j. **Net returns to Stock and Bond investors.** The result of all these conditions is that, notwithstanding the small dividends paid, by reason of the public's knowledge of the road's strength and earning capacity, and the justified expectation of higher dividends later, the average net return to the investor in Michigan Central stock from 1898 to 1901, even at the price of $1.15 paid by the New York Central therefor, was but 3.48 per cent., and at the higher market prices prevailing later, the net return was even less.

Net return to bond investors. The net interest returns to investors in Michigan Central bonds for the year 1902, taking into account the market price paid for the bonds, are as follows: according to the computation of banker Lisman, from 3.20 per cent. to 3.40 per cent. (R. pp. 565-7, 570); according to the computation of Prof. Adams, from 3.25 per cent. to 3.5 per cent. (R. p. 502); according to Mr. Thompson's computation, over a period of 8 months before and 4 months after April, 1902, from 3¼ per cent to 3¾ per cent. (R. p. 610), or an average of about 3½ per cent. Mr. Wildes says these bonds are good investments on a 3.75 per cent. basis (R. pp. 574, 576), and Mr. Lisman says they are "A No. 1" (R. 570.) They are regarded as so good that they are "legal" for New York savings banks, etc. (Lisman, R. p. 568.)

This testimony as to bond values, the net return to the investor, and that there is an abundant market for Michigan Central bonds at the prices stated, is undisputed. In fact, Mr. Woodlock, editor of the Wall Street Review, as a witness for appellant, testified in 1904 regarding the bonds of the Michigan Central (as well as several other roads) that the "market was sufficient to take care of a 3½ per cent. bond issue of these roads at par and better, notwithstanding taxa-

tion; plenty of good 3½ per cent. bonds have been worth par until within a year or so." (R. p. 662.)

For the purpose of showing that the Michigan Central Railroad properties were under-assessed by the State Board of Assessors for the year 1902, three different methods of computing values are presented by defendant, namely: (1) The capitalization of net earnings; (2) The stock and bond plan; and (3) The Cooley and Adams plan, so-called, by which there is added to the physical values such non-physical value as results from capitalizing the final net surplus earnings remaining after paying a proper annuity or interest rate on the physical value. Not only does each of these methods yield a value far in excess of the 1902 State Board Assessment, but the valuations reached by each of these methods are so nearly alike as to furnish mutual corroboration.

2. The appraisal of the railroad as a unit, including both physical and non-physical values, and the apportionment thereof upon a track mileage basis, is proper.

The right to appraise a railroad for taxation **as a unit** and to include in such appraised valuation both the physical and non-physical elements, is too well settled to require discussion. All of the experts sworn in the case, including Prof. Adams and Mr. Green, as well as Prof. Johnson, who was presented by appellant, affirm the existence of this non-physical element, by whatever name it may be known. (R. pp. 496, 553, 669-70.) Prof. Adams defines it as the value in excess of that found by the Engineer's inventory of the property (R. 496.) Prof. Johnson says he includes in the term "all the elements which Mr. Adams enumerated as elements of non-physical value." (R. pp. 669-70.) It is sufficient, however, to say that both by the decisions of this Court, by the express provisions of the statute of Michigan, and by the decisions of the Supreme Court of that state construing its own statute, the right to tax the rail-

way as a unit and to include therein the franchise value, is definitely established.

We refer to the following decisions of this Court:

Adams Express Co. vs. Ohio State Auditor, 165 U. S. 194.

Am. Express Co. vs. Indiana, 165 U. S. 255.

Adams Express Co. vs. Kentucky, 166 U. S. 185.

Gulf, etc. Ry. Co. vs. Hewes, 183 U. S. 66.

Pullman Palace Car Co. vs. Penna., 141 U. S. 18.

Maine vs. Grand Trunk Ry Co, 142 U. S. 217.

New Orleans Ry. Co. vs. New Orleans, 143 U. S. 192.

Taylor vs. Secor (State R. R. Tax Cases), 92 U. S. 575.

The Michigan Statute. But we are not left to rely upon a rule of decision in the absence of statute. The statute of Michigan under which the assessment in question was made, expressly provides both for the assessment of railway property as a unit and for including therein the non-physical value. The statute provides that "The term 'property' as used in this act, shall be deemed to include all property, real or personal, belonging to the corporation, subject to taxation under this act, including the right-of-way, road-bed, stations, cars, rolling stock, tracks * * * and all other property used in carrying on the business of such corporations, or owned by them respectively, and all other real and personal property, and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property."

P. A. Mich. 1901, p. 238, Sec. 5.

Track mileage apportionment. This Court has expressly sustained the right of a state to impose a tax based on the proportion of the value of the property within the state to the whole property of the Company.

State R. R. Tax Cases, 92 U. S. 608, 611.
Adams Express Co. vs. Ohio State Auditor, 166 U. S. 185.
Pullman Palace Car Co. vs. Pennsylvania, 141 U. S. 18.
Maine vs. Grand Trunk Ry. Co., 142 U. S. 217.
W. U. Telegraph Co. vs. Taggart, 163 U. S. 21.

In **Pullman Palace Car Co. vs. Pennsylvania** (supra) it was said by this Court, quoting from Mr. Justice Miller in State Railroad Tax Cases, 92 U. S. 608, 611:

> "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole. * * * This Court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. In re Delaware R. Tax, 18 Wall. 206; Erie R. Co. vs. Pennsylvania, 21 Wall. 492."

But the statute of Michigan expressly gives such authority. It provides: "In determining the true cash value of the property of railroad * * * companies which own, lease or operate lines partly within and partly without this state, said Board shall be guided in ascertaining the property subject to taxation in Michigan by the relation which the number of miles of main track within the state of Michigan bears to the entire mileage of the main track of said companies both within and without this state." (P. A. Mich., p. 242, Sec. 8.)

There is no evidence in the record that such track mileage apportionment results unfairly to the Michigan portion.

The cross-examination of Prof. Adams and of Mr. Green suggests, however, a contention on appellant's part that the inclusion of non-physical value in the assessment of railroads puts those corporations on a different basis than other taxable property. There is no merit in such contention.

3. The taking of franchise values into account in determining assessed valuations of railroad properties under the Michigan ad valorem tax law does not create lack of uniformity of taxation, nor does it put railroad properties on a different basis than property generally in the state.

a. Both railroad property and general properties are required by statute to be assessed on the same basis, namely, true cash value.

The non-physical value in all property in the state taxable under the general law, so far as such intangible value is found to exist, must be taken into account; in other words, had appellant's railroad properties been assessed under the general law of the state instead of under the railroad ad valorem tax law, its non-physical value must have been included. The railroad tax statute merely followed the general Michigan rule as declared by the Supreme Court of that state in the construction of its general statute.

All property in Michigan, whether railroad or otherwise, is thus put upon precisely the same basis with respect to the assessment of non-physical value.

The present railroad tax law expressly requires the assessment of railway properties at their "true cash value."

P. A. Mich. 1901, p. 241, Sec. 8.

Property, generally, throughout the state is required to be assessed on precisely the same basis.

C. L. Mich. 1897, Sec. 3847.

In the case both of property having a franchise value and that having no such value, the statute defines "cash value" as

the "usual selling price which could be obtained therefor at private sale, and not at forced or auction sale."

C. L. Mich. 1897, Sec. 3850.

Detroit Citizens St. Ry. Co. vs. Common Council, 125 Mich. 682.

If franchise value is not included in the assessment, it is, so far as the rule of law is concerned, only because the given property has no such value.

Steam railroads generally have an actual franchise value as declared not only by this Court, but by the Supreme Court of Michigan. So far as steam railroads are concerned, the statute expressly provides that this franchise value be taken into account in their assessment.

P. A. Mich. 1901, p. 238, Sec. 5.

The argument that because it is not practicable to assess a non-physical value in the case of an ordinary business because of a lack of method by which net earnings can be ascertained as readily as in the case of a railroad company, has no merit. In fact, and as recognized by the authorities, few manufacturing and commercial corporations have a value in excess of the cost of reproducing their physical property.

Adams' Test., R. pp. 514, 518-19.

Green's Test., R. pp. 551-564.

This proposition is expressly declared by the Supreme Court of Michigan in Detroit Citizens St. Ry. Co. vs. Common Council, 125 Mich., at page 681.

Railroads are in class by themselves. The difference between railroads and ordinary manufacturing and commercial corporations as recognized by the Courts, including their monopolistic character, the fact that their traffic is not exposed to competition of the kind incident to general manufacturing and commercial business, the right to use public property, occupation of the highways, and the right of eminent domain, the fact that the service is public and the traffic one of increas-

ing density and increasing returns, are enumerated in the testimony of Professor Adams. (R. pp. 497, 514.)

That these characteristics differ from the good will of an ordinary business appears not only from Professor Adams' testimony referred to, but by the decision of the Supreme Court of Michigan in Det. Cit. St. Ry. Co. vs. Common Council (supra). But it is expressly held by the Supreme Court of Michigan in the case last referred to, that under the general tax law regarding uniformity of valuation, wherever such non-physical or franchise value actually exists, whether in the case of gas companies, water companies, or manufacturing establishments and large buildings favorably located and adapted to special uses, in excess of the cost of reproduction of the physical assets, such value should be taken into account in **assessments under the general tax law.**

Detroit Cit. St. Ry. Co. vs. Common Council (supra.)

That Court has thus held that the taxation of corporate franchises, even in the absence of a statute expressly providing therefor, that is to say, made under the general tax law, does not violate the statutory and constitutional requirement of uniformity. All property similarly situated it, by this decision, on precisely the same basis. This construction of the general tax law of Michigan was so adopted in the case of the assessment of the property of a street railway company under the general tax law of the state. This general tax law contains no express mention of franchises and the decision was thus necessary to a decision of the case.

It is noticeable and significant that the railroad ad valorem tax law in question was passed immediately following the decision of the Michigan Supreme Court in Detroit Citizens Street Ry. Co. vs. Common Council (supra), that decision having been rendered February 12, 1901, and the statute in question having been approved May 27, 1901—and that the

manner prescribed in the railroad tax law for taxing franchise values **follows directly** that declared proper and necessary under the general tax law of the state.

P. A. Mich. 1901, p. 235, Sec. 5.
Detroit St. Ry. Co. vs. Common Council, 125 Mich. 673.

We submit that it is clear that the law under which appellant is taxed, and the inclusion in its assessment thereunder of non-physical values, does not create lack of uniformity of taxation, nor does it put railroad properties upon a different basis than that occupied by property generally in the state.

b. **Separate valuation of franchise. Appellant's franchise was not separately valued, but such separate valuation would not be invalid.**

Appellant's witness, Prof. Johnson, testified that if the State Board of Assessors should arrive at a valuation of property by computing, first, the physical value, and, second, the franchise value, he thought it would result in a separate valuation of the franchise of the corporation. (R. p. 670.)

This was objected to as incompetent and calling for a conclusion not a basis of expert testimony.

If this testimony is intended as a basis for attacking the railroad assessment in question, it is manifestly without force. The bill of complaint does not allege any invalidity of this nature with respect to the assessment. Nor is there any testimony whatever in the record tending to show that such a course was taken. On the contrary, the testimony, so far as it has any significance either way, is against an implication of a separate valuation of the franchise. (McLaughlin's Test., R. p. 432 and ff.; Dust's Test., R. p. 439 and ff.)

The conclusive answer to this suggestion is found in the face that the report of the State Board of Assessors for 1902 expressly states that in the valuation of railroad property, in the opinion of that Board, no one plan should be arbitrarily

followed, but that each "property should be subjected to an examination covering every possible phase of the question." (R. p. 345.)

But even had some members taken into account the franchise value as a tangible and fixed sum to be included in connection with the value of the tangible property in arriving at the assessed valuation of the railroad as an entirety, such fact would not vitiate even an assessment. In Detroit Cit. St. Ry. Co. vs. Common Council, 125 Mich., at page 705, where the valuation of a street railway, including its franchise, was under consideration, it was said:

> "Perhaps no two of the assessors reached the result by the same process, but this is not material if they finally concluded that the property was honestly worth, in the market, in cash, the sum assessed; we think this assessment should not be set aside merely because an effort may have been made by someone to separate tangible and intangible values; a thing that was unnecessary and one that was harmless, provided, as already stated, the Board really did reach the conclusion that the property was worth, and would bring, in cash, the sum adopted."

If the testimony of Prof. Johnson was aimed at the Cooley and Adams appraisal, it is clearly immaterial. No assessment has in fact been had upon that plan.

The testimony of computations and valuations.

The valuations of appellant's physical properties are discussed on pages 100-103 of this brief. The value of the Michigan Central and Canada Southern stocks and bonds held by the general public, the net return thereon to investors, and the proper capitalization rates, and other information necessary to a computation of the actual values by each of the three methods referred to, were given by six witnesses specially qualified for the purpose, namely: Henry C. Adams, Clarence

H. Wildes, Frederick J. Lisman, Melville W. Thompson, Thomas L. Greene and James Walker.

Prof. Adams, whose record and experience is shown on pages 594-5 of the Transcript of Record, in addition to his academic and theoretical education, has had a broad experience peculiarly fitting him for an appraisement of the nature made by him in this case. Since 1887 he has been Statistician of the Interstate Commerce Commission. He was the statistician for the Postal Service Commission in 1899, was expert agent in charge of the Transportation work in the United States Census of 1850. Through his relations (as Interstate Commerce Statistician) he is Chairman of the Committee on Uniform Railway Statistics of the Association of Railway Commissioners, and has published statistical reports of the work of the Interstate Commerce Commission during his entire connection with that body, as well as volumes on Transportation for the Census Report of 1900, and a Compendium of the Railways of the United States for 1902. He participated with Prof. Cooley in making the Michigan Railway appraisal of 1900 before referred to. He has given special attention to the subject of the history and evolution of taxation of railways in the United States, and is the author of a history of taxation.

Prof. Adams has carefully investigated the financial condition and value, and the earning capacity of the Michigan Central Railroad, as well as of the other railroads involved in kindred litigation. His testimony is found on pages 494 and following of the record. He presents tables showing the gross income of Michigan Railroads per 10,000 inhabitants, per 100 square miles and per mile of line. This table is found following page 510 of the Record. His tables showing the gross earnings and net earnings of the entire system and of the Michigan portion from 1898 to 1902, both inclusive, are found on pages 510 and 511 of the Record. His testimony

upon these subjects is referred to on pages 100-111 of this brief, in the discussion of the general title: "The Evidence of Actual Value of Appellant's Railroad Property in 1902."

Mr. Wildes has been for twenty-five years a banker and broker in investments and securities, is a member of the banking firm of J. & W. Seligman & Co., and is familiar with the securities of the Michigan Central and other railroads. His testimony (found on page 572 and following, of the Record) regarding the market value of the Michigan Central stock in 1902 and previous years, and its high and low price for the years 1900, 1901 and 1902, his dealings in Michigan Central stock, his relations with President Ledyard in connection therewith, and his estimate of the net return to investors in Michigan Central bonds, is referred to on pages 104-111 of this brief.

Mr. Lisman is a banker and broker in New York, making a specialty of railroad bonds. He is a specialist, and the principal dealer in all of the smaller issues of railroad bonds. He furnishes the Commercial and Financial Chronicle quotations for railroad bonds. His business ranges from $20,000,000 to $75,000,000 a year. He is familiar with the bond issues of the Michigan Central and their value, and has made sales of Michigan Central stock.

His testimony (found on page 564 and following, of the Record) relating to Michigan Central bond and stock values, the net returns to the investor in Michigan Central bonds for the period in question, is referred to on pages 104-110 of this brief.

Mr. Thompson has made a careful study of the Michigan Central stocks and bonds. His table of stock values from October 28, 1901, to August 5, 1904, is found on pages 603 to 604 of the Record. Schedule "831a" (following p. 596 of the Record) contains a detailed description of the Michigan Central stocks and bonds, the stock exchange transactions

and volume of sales, and the market value of the various classes as shown by the financial and stock exchange reports and transactions. His testimony as to the market value of the stock and bonds for the period in question, is found on pages 104-110 of this brief.

Thomas L. Greene (whose record and experiences are found on pages 551 and 552 of the Record) was, at the time his testimony was taken, Vice President and Manager of the Audit Company of New York. He was previously an officer of the Manhattan Trust Company of that city, for six years editorial writer on financial and business subjects for the New York Evening Post, is the author of a work on corporation finance, as well as papers and periodicals on financial and business subjects, and has had a broad, practical experience in the investigation of questions relating to those subjects. His testimony as to the rates that investors in Michigan Central stocks are satisfied with, and the proper capitalization rate for obtaining intangible values, is found on pages 555-6 of the record.

James Walker, consulting engineer to the State Board of Assessors, since October, 1899, has been engaged in valuing railroad property, and acted as an advisor to the State Board of Assessors in the 1902 railroad assessment. He has studied and abstracted the information contained in the Railroad Companies' reports to the Michigan State Board of Assessors, to the Michigan Railroad Commissioner and to the officers of adjoining states, and to the Interstate Commerce Commission. His duties included advising the State Board of Assessors, in an expert capacity, of the value of the railway properties under consideration.

He has made a careful and detailed valuation of the Michigan Central properties, his plan being based upon a consideration of all the elements surrounding the property, including the physical condition, the amount of stocks, bonds and cur-

rent liabilities, the income and operating accounts of the road over a series of years, the stability of the income account, the extent of permanent improvements, repairs and renewals, with the design of ascertaining what would be the selling price of the property. (R. pp. 612, 613.)

His analyses of Michigan Central traffic statistics, both freight and passenger, are found on pages 616 to 634 of the Record, and include charts indicating the relation of the operating expenses to the gross earnings from 1882 to 1902. He also presents computations of taxes paid by the appellant railroad company and other railroads on local real estate. (R. p. 636.) His testimony as to these subjects generally is referred to in the discussion on pages 105-107 of this brief.

4. Each of the three methods of valuation employed has received the approval of the Courts as furnishing a fairly safe guide for the purpose of determining values for taxation.

a. **The net earnings method.** A valuation by capitalization of net earnings has received the approval of the Courts.

Railroad & Tel. Cos. vs. Equalizers, 85 Fed. 302.
Chicago Union Trac. Co. vs. State Board, 114 Fed. 557.
People vs. Hicks, 40 Hun, 598.
People vs. Assessors. 2 N. Y. S. 240.
People vs. Reid, 64 Hun, 553.
People vs Kalbfleish. 49 N. Y. S. 546.
Taylor vs. R. R. Co., 88 Fed 350. (C. C. A. 6th Cir.)
L. & N. Ry. Co. vs. Coulter, 131 Fed. 282, 304.

In **Railroad & Tel. Companies vs. Equalizers** (supra) Judge Clark said:

> "When we come to **actual earnings**, a sensible and **safe** element is reached which may be properly regarded in determining actual as distinguished from purely speculative values on property."

In **People vs. Assessors** (supra) a capitalization of 5 per cent. on the net earnings for a period of five years was approved, being characterized as "the approved legal method of assessing railroads."

In **Colorado Southern Ry. Co. vs. Wright,** 151 U. S. 470, this Court quoted with approval from the decision of the Supreme Court of Tennessee:

> "The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock."

This language was cited with approval in **Pittbsurg, etc. Ry. Co. vs. Backus,** 154 U. S. 424.

In **Taylor vs. R. R. Co.** it was said:

> "The relevancy of such items of evidence as the market values of stocks and the amounts of gross earnings and net earnings in reaching a conclusion as to the value of a railroad or telegraph line has been so often recognized by the Supreme Court of the United States that we need not discuss it."

In **L. & N. Ry. Co. vs. Coulter,** the Court says that it does not find it necessary to express any preference between the stock and bond plan and the net earnings plan.

It is not claimed that the net earnings method taken alone is infallible. It must of course be used with discrimination, and exclusive reliance cannot in all cases be placed in it. For instance, it would not be applicable when earnings are insufficient to pay an annuity on physical value, nor when earnings were unstable. But as applied to the Michigan Central Railroad Company, with its large and stable net earnings in excess of a proper annuity on physical values, the net earnings method furnishes a safe guide for determining actual

values. The testimony of Prof. Adams that "the conditions of the Michigan Central permit the application of the net earnings rule if that rule is applicable anywhere" (R. p. 512) is wholly undisputed upon this record.

Mr. Walker, who made the computation upon this plan, testifies that the plan as applied by him is based upon the consideration of all the elements surrounding the property; its physical condition; the amount of its stocks, its bonds and current liabilities; whether interest and dividends have been paid; the income and operating account over a series of years; whether the operation is the result of an extraordinary condition of the times; the operating expenses; the inclusion of permanent improvements therein; traffic conditions; and the geographical relations of other property. (R. p. 613.)

We have seen nothing in the record to impugn the reliability of this statement.

The Department of Commerce and Labor, under the authority of the federal statute, has lately made an elaborate investigation as to the methods of valuing the operating properties of railway corporations. This investigation was made under the direction of Prof. B. H. Meyer of the University of Wisconsin, who was appointed expert special agent representing jointly the Interstate Commerce Commission and the Bureau of the Census. This investigation has resulted, in the language of the letter of transmittal accompanying the report of the Director, "in the acceptance of operating railway systems as the units of appraisal and in the rule that the valuation of such systems should be arrived at by the capitalization of their true net earnings at a rate to be determined by the market value of their securities."

> (Bulletin 21, Dept. of Commerce and Labor, "Commercial valuation of railway operating property in the United States, 1904," and letter of transmittal accompanying the same.)

b. **The Stock and Bond method.** The stock and bond method of valuation is based upon the proposition that the market value of the stocks and bonds of a corporation represents the estimate of the public upon the value of the properties represented thereby. The accepted rule is to take the market value of the stocks and bonds as the measure of the corporate value of the property.

This method of valuation of railroad properties has received the express approval of this Court.

State Railroad Tax Cases, 92 U. S. 575.
Pittsburgh, etc. Ry. Co. vs. Backus, 154 U. S. 421.
West. Union Tel. Co. vs. Taggart, 163 U. S. 1, 21.
Henderson Bridge Co vs. Kentucky, 166 U. S. 150.

In **State Railroad Tax Cases** Mr. Justice Miller said (pp. 604-5):

> "It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and far-sighted men, and most careful in their investments; hence the value these securities hold in market is one of the truest criteria, as far as it goes, of the value of the road as a security for the payment of those bonds.
>
> These mortgages are, however, liens on the road, and taking precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must, in any event, affect that value to the exact amount of the aggregate debts; for all that goes to pay that debt and its interest diminishes **pro tanto** the dividend of the shareholder and the value of his share. It is therefore obvious that when you have ascertained the current cash value of the whole funded debt and the current cash value of the

> entire number of the shares, you have, by the action of those who, above all others can best estimate it, ascertained the true value of the road, of its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

The stock and bond method of valuation has also received the approval of other Courts in the following cases:

> Taylor vs. R. R. Co., 88 Fed. 350. (C. C. A. 6th Cir.)
> Chicago Union Trac. Co. vs. St. B'd, 112 Fed. 607.
> Porter vs. R. R. Co., 76 Ill. 561, 589.
> B'd of Equalization vs. People, 191 Ill. 528.
> State vs. Savage (Neb.), 91 N. W. 717.
> Sanford vs. Poe, 69 Fed. 546 (C. C. A. 6th Cir.)

In **Taylor vs. R. R. Co.** the Court of Appeals of the 6th Circuit said:

> "The relevancy of such items of value as the market values of bonds and stocks and the amount of gross earnings, and the net earnings, in reaching a conclusion as to the value of a railroad or a telegraph line, has been so often recognized by the Supreme Court of the United States that we need not discuss it."

In view of these decisions, the general objections to this method of valuation, presented by appellant's witness Johnson and others—that the securities of the road do not represent the actual valuation of the property; that it is not certain that the investment made at the time of the issue of the securities corresponds sufficiently closely with the actual value of the property into which the investment went; that the market values of stocks and bonds are influenced largely by speculative forces and the criticism made by the Interstate Commerce Commission upon the method as not universally applicable—requires no discussion. They are effective as against

the decisions of this Court only so far as they assert the necessity of eliminating speculative conditions which, we submit, exist in a minimum degree in the case of the Michigan Central.

Not one of the objections above referred to has any application to the case of the Michigan Central Railroad. As already shown, the physical value of the railroad is largely in excess of its entire bond issue and in excess of that valuation as carried upon appellant's books. The market values of Michigan Central stocks and bonds are not increased by speculative forces. It affirmatively appears in the record that Michigan Central securities are not the subject of general speculation. The great bulk of its stock is held by the New York Central Railroad, and thus withdrawn from market. The record in this case shows very little activity in this stock, no sales being reported for months at a time. It is rarely that Michigan Central quotations are found in any of the newspaper stock reports.

The only speculative feature suggested is the fact that dealers in minority stock have enhanced ideas of its actual value from the fact that the New York Central is ready to buy it, and expect that larger dividends will be paid when the New York Central shall have purchased all it could get of the Michigan Central stock.

But not only is this market value the estimate of the public of the value of Michigan Central securities, but the testimony is convincing that this estimate is intelligent and well founded, as shown by the testimony before referred to in this brief as to appellant's increasing prosperity and stable and steadily increasing net earnings, and its President's admission as to the actual value of the stock. Indeed, if the ownership by the New York Central of 17-18ths of the stock of the Michigan Central had any influence upon the market value of the remaining 1-18th, it would be to depress that value, and whatever increase in market values has resulted above the

price offered by the New York Central has been in spite of that depressing influence. (See Wildes' Test., R. pp. 575-6; Thompson's Test., R. pp. 601-3.)

Indeed, there is no criticism anywhere in the record upon the statement of Prof. Adams that the market price of Michigan Central stock would have been higher but for the practice of that road of paying for additions and betterments out of operating expense, and thus for the present decreasing dividends. (R. pp. 814, 816.)

In the face of these considerations, no testimony entitled to weight has been presented against the reliability of the stock and bond plan as specifically applied to the Michigan Central Railroad. Mr. Marwick suggests no reason for his opinion.

Treasurer Cox's opinion is based upon the earning capacity of the Road and the fact that there is no market for a considerable portion of the stock; but the earning capacity is shown both by the tables presented by Prof. Adams and by President Ledyard's admission, to be far in excess of the reported net earnings.

Mr. Woodlock, whose opinion is based upon the fact that the public believe that the New York Central would buy "Junior Vanderbilt" stocks at fancy prices, is compelled by the market reports to admit that the same percentage of advance shown in Michigan Central stock occurred at the same time in roads which were not "Junior Vanderbilts," such as the New York Central, Illinois Central, Pennsylvania, Chicago & Northwestern, Ann Arbor, Delaware & Hudson, Chicago, Milwaukee & St. Paul (R. pp. 663-667, thus entirely destroying the basis of Mr. Woodlock's opinion.

Mr. Russell's opinion is based upon the proposition that to his mind capitalization means cost—thus suggesting a rejection of all intangible value and an adherence only to the

physical. "No railroad has any value in excess of its physical property." (R. p. 693.)

That every caution was exercised in reducing to a minimum all speculative and uncertain elements goes without contradiction.

For instance, in obtaining the market value of bonds, accrued interest to the time of purchase was deducted.

No stocks or bonds were taken into account except those held by the general public, the value of the stock of the parent company being regarded as including the value of the securities of subsidiary roads held by that company.

Where quotations for a given security were meagre or lacking, quotations of securities in all respects similar were used as guides.

Quotations from 1890 to 1902 were carefully studied in order to make sure that unusual and speculative conditions were eliminated.

A so-called weighted average (obtained by giving effect to the number of bonds in each sale) was used so as to give a large sale relatively more influence in determining the normal price. (Adams' Test., R. p. 498.)

Unless, therefore, there is something inherently unreliable (as it has been repeatedly held there is not) in the stock and bond method of valuation, it was eminently proper to be applied here.

c. **Capitalization of final net surplus.** This method is simplicity itself. It involves, first, ascertaining the net income from operation and all other sources; deducting from this net income an annuity or interest charge upon the value of the physical property, and capitalizing the remaining surplus, thereby obtaining the value of the non-physical property. It is thus seen that the plan provides for a return upon the investment in physical properties after payment of taxes

(which are included in operating expenses) and for capitalizing the balance. (Adams' Test., R. pp. 500-501.)

This plan is manifestly safe and conservative and avoids whatever difficulties are connected with either the stock and bond plan or the method of capitalization of net earnings.

The criticism of appellant's counsel upon this method (R. pp. 522-5) that it would be possible for a railroad property earning the same gross receipts and having the same operating expenses (and thus the same net earnings) for a term of years, to be assessed from year to year at varying valuations, is completely answered by Prof. Adams. The criticism is not only based upon the practically impossible assumption that physical value, net earnings, and tax rate would remain exactly the same over a period of years, but it takes into account the tax for but the one previous year instead of an average over a term of years. (R. pp. 522, 524-5.)

Upon this proposition we need spend no time, as not only is there in the record no serious criticism upon it, but the complainant's sole expert witness (Prof. Johnson of Pennsylvania University) gives it his unaqualified approval, and has so put himself on record both in his published work on "American Railway Transportation" and as a witness in this case. His testimony is "The view held when I wrote that book (American Railway Transportation) and that I now hold is that Prof. Adams' theory of valuation (as outlined in 1900) is sound in principle, and may be employed to secure equitable taxation of railroad property." (R. p. 674.)

In the supplement prepared by Prof. Meyer to Bulletin 21 of the Department of Commerce and Labor before referred to, the following endorsement of the method employed by Prof. Adams is given:

> "The method which satisfies in the highest degree the requirements of the valuation of railway systems as a whole, as well as the distribution of the

> total values of such systems among states, is the inventory method. This is a composite method, each constituent element in which is designed to solve one phase of the general problem of valuation and value distribution. The basal principle of the method is an engineer's estimate of the cost of reproduction of all physical properties, "new" and in "present condition," the latter being usually expressed in terms of per cent. of the former. * * * The inventory method thus embraces the net earnings method of the present valuation, and, in addition, an actual survey of every railway property which lies at the basis of the whole. It involves capitalization of net earnings, but only that part of the net earnings which is not used in paying a reasonable return on the investment in the physical properties, and taxes. The capitalized sum thus arrived at is known as the non-physical or intangible value. The total value of a railway is thus the value of its physical property, plus its non-physical value. This method is described in Paper VII, which explains the Michigan and Wisconsin methods of valuation."
>
> Bulletin No. 21, pp. 19 and 20.

The only open questions relate to the details of the application of the plan, such as the capitalization rates to be employed, the terms of years over which the net earnings should be taken, whether taxes should be included, etc.

d. **Not an income tax.** Neither the net earnings method nor the Adams plan embracing the physical valuation increased by a capitalization of final net surplus, can properly be called an income tax either in whole or in part. Surely a tax upon a valuation so ascertained has none of the elements of an income tax. The differences between a tax on property ascertained by capitalizing its net income, and a tax

on income, are clearly pointed out by Prof. Adams and by Mr. Cooley. (R. pp. 516-17, 518, 556, 560, 562.)

The distinction is clearly recognized in

Judson on Taxation, Sec. 327.

As said by Mr. Justice Brewer in his opinion in the Adams Express Co. case (166 U. S. 220):

> "Now, it is a cardinal rule which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation."

That the income or value of the franchises of a railroad may be made the basis for determining its value, has been frequently decided by this Court.

State Railroad Tax Cases, 92 U. S. 575.
Delaware R. R. Tax Case, 18 Wall. 208.
Erie Ry. Co. vs. Penna., 21 Wall. 492.

5. The basis on which the computations by the different methods were made, and their results.

a. The Net Earnings method.

Mr. Walker took the average gross earnings of this system for a period of five years, including 1902, deducted 70 per cent. as a normal operating expense (which is shown on pp. 107 to 108 of this brief to be higher than the normal) and thus found the net earnings. To this he applied the Michigan track mileage ratio of 68.562 per cent., and capitalized the resulting sum at 5.65 per cent., being 4 per cent. (which is higher than the yield to investors in Michigan Central stocks and bonds) added to the Michigan tax rate of 1.65, making the Michigan valuation $61,200,000. (R. p. 634.)

The same basis of capitalization for the year 1902 would make $70,102,600. (R. p. 634.)

b. Stock and Bond method.

Mr. Thompson took the conceded 1902 average market price of the $43,049,000 of Michigan Central bonds held by the

general public at $46,357,400; the conceded unfunded debt of $3,621,056 at par; the $18,738,000 Michigan Central Railroad stock at its undisputed 1902 average market price of $161.58; the $15,000,000 Canada Southern stock at its undisputed 1902 average market price .85927 (thus excluding all stocks and bonds of subsidiary roads held by the Michigan Central and the Canada Southern), applied the Michigan mileage ratio of 68.562, deducted the taxable value of the Michigan Central real estate taxed locally ($748,000—R. pp. 635-6), and reached a valuation of $64,632,264.

Thompson's Test., R. pp. 597-8.
Table "831a" following p. 596.

(If President Ledyard's statement of the actual value of Michigan Central stock were taken instead of the 1902 average market price, the valuation would of course be much larger.)

c. **Inventory and Capitalization of Final Net Surplus.**

Prof. Adams, as before stated, as the result of the careful investigations which he had made into the market values of Michigan Central stocks and bonds, had found the rate which investors were satisfied to receive in those bonds to be 3½ per cent., and upon the stocks of the road, 5 per cent. His judgment as to this return which investors were willing to accept upon this class of bonds was fortified by a comparison of quotations with the bonds of three other prominent roads. (R. pp. 501-2.)

He took the average annual net earnings for 1898 to 1902, inclusive, **as reported by the appellant railroad**—after deducting taxes paid, and without making any correction by reason of the amount by which the reported net earnings were depressed on account of the large sums charged to oper-

ating expense for additions and betterments, at..	$3,620,377 00
Of this amount he took the Michigan mileage ratio of 68.562 (R. pp. 510, 511).....	2,503,345 00
From this he deducted an annuity of 3½ per cent. (being admittedly the average return investors in Michigan Central bonds—assumed to represent physical values—were content to receive) upon an undisputed physical valuation (Michigan proportion) of $46,101,011.....	1,613,535 38
Leaving a remainder of net earnings to be capitalized	889,809 62
This net remainder or final surplus he capitalized at 5 per cent.—which was much more than investors in Michigan Central stocks were contented to receive, but which is shown to be fully equal, if not above, the market rate for money for investments of this kind—making the non-physical valuation.....	17,789,200 00
To this he added the undisputed value of the physical property (Michigan proportion).....	46,101,011 00
Making the aggregate of the Michigan proportion	$63,890,211 00

Prof. Adams' Test., R. pp. 512, 544.

It will be noted that in this computation no account was taken of the large **sums paid out of operating expenses on account of betterments and additions.** The net earnings taken were those reported by the appellant railroad after paying these two classes of disbursements, as well as taxes, out of operating expenses. The fact that such payments had been so made affected **merely the capitalization rate.** (R. pp. 530-1.)

The close correspondence between the respective valuations on the three methods employed, namely:

Net earnings method.....$61,200,000
Stock and Bond method..... 64,632,264
Capitalization Final Net Surplus..... 63,890,211

is significant as showing how peculiarly the Michigan Central Railroad, by reason of its prosperity, the remarkable stability of its net earnings, and its non-speculative condition, is adapted to each of these recognized methods of valuation.

The methods are mutually corroborative.

CRITICISMS UPON THESE COMPUTATIONS.

a. **The Stock and Bond Method.**

There is no controversy over the real or market values of the bonds.

As to real stock values: Three witnesses for appellant give their opinions of the value of this stock. Mr. Marwick (the accountant) thought it was worth "in the neighborhood of par in 1902 rather than over." (R. p. 649). The basis of his opinion does not clearly appear except that it may be inferred to rest generally upon his idea of actual earnings and net return to stockholders. What his idea of a proper net return should be, we are not informed. His opinion of stock values is discredited by his admission that the Lake Shore when earnings 13½ per cent. and paying 7 per cent. dividends, sold at between 200 and 300 in 1901, and at between 300 and 400 in 1902 (R. p. 652), in connection with the showing that the Michigan Central was actually earning that year 10½ per cent. after its net earnings were corrected by excluding from operating expenses amounts paid for betterments and additions, and taking into account the natural implication from the undisputed testimony of Mr. Wildes (R. pp. 575-6) that the Michigan Central will pay even more than the 6 per cent. stated by President Ledyard when all the available minority stock has been bought in.

Treasurer Cox thought, for 1902, that "The stock as a whole had no value above par" (R. p. 656) and thought the Canada Southern stock was actually worth 55 cents. He seems to base his opinion of stock value upon the proposition that because a more expensive equipment is needed to operate a railroad now than formerly, on account of increased traffic, larger engines, cars, etc., the stock is worth no more because the roads must keep a larger surplus on hand. (R. pp. 657-8.) This argument would equally apply to a taxation of shares of bank stock which represent a surplus.

He also calls attention to the fact that the 3½ per cent. bonds given by the New York Central for the stock at 115 sold during 1901 and 1902 at a price to net the holder about par on the stock sold. But this fact has little bearing upon the actual value of the stock as against the cash market for the stock at the time, for the New York Central could get in but very little outstanding Michigan Central stock during the entire two years referred to at the 115 price. (Table, Woodlock's Test., R. p. 661.)

The sale price of the bonds means only that those holding them (having bought perhaps as early as 1898) sold them on the basis of the money market, as the bonds in question were the direct obligation of the New York Central secured by the Michigan Central stock, in which the bondholder had no interest except in case of the New York Central defaulting on its direct obligation. (R. p. 659.)

Mr. Woodlock thought that the Michigan Central stock was worth in 1902 practically par. He says at one time "80 to par," but later says that the physical condition of the Michigan Central makes a difference in the stock's selling price and that "par would reflect that very decidedly." (R. p. 663.)

The undisputed record shows that Michigan Central stock had a minimum stable value of from 130 to 140 per cent, Mr.

Wildes stating it at 145 (R. p. 572) as compared with the average market value of 161⅝. (Schedule "831a" following p. 596 of Record.)

As to the period over which stock quotations should be taken. Manifestly the only reason for taking an average over a considerable period is to eliminate the speculative element. Mr. Greene says that a period of six months to one year is ample, and that the New York Banking Department, under the provisions of the statute requiring trust companies and banking institutions to make a report of the value of stocks and securities owned upon a certain day, has adopted a period of six months for obtaining an average of values. (R. p. 554.)

The Department of Commerce and Labor in its commercial valuation of railroad properties for 1904 adopted a six months period for market quotations as the general rule, lengthening the period whenever the changes in the market were "violent and apparently capricious." (Bulletin No. 21 referred to, p. 22.)

We submit that the period taken by Mr. Thompson (substantially one year—from October, 1901, to August, 1902) furnished a safe guide.

Period for bond quotations. Mr. Lisman says that a period of three to six months is sufficient to furnish a safe average. (R. p. 567.)

Minimum value of stock. That the Michigan Central stock has a minimum market value of 115 the complainant is estopped to deny. Not only has the New York Central an outstanding offer for the minority stock at that price (which it is not necessary to buy except as an investment—it already having a 17-18 interest) but the Michigan Central report to the state officials gives the value of the stock as about 115.

Computing the Michigan Central stock at 115, the Canada Southern at the price shown by the reports, and excluding the unfunded debt, as well as the stock held by the general

public other than the two classes above given, the value of the Michigan portion of the system on this conservative stock basis, is shown to be upwards of 55½ millions, as follows:

Market value of bonds in hands of public	$46,357,400
Michigan Central stock ($18,738,000) at 115	21,548,700
Canada Southern stock ($15,000,000) at .89527	13,429,050
Total	$81,335,150
Michigan proportion, 68.562 per cent	55,765,005

This is nearly 25 per cent. above the 45 millions State Board assessment of 1902. A computation upon such a basis is certainly fair to appellant.

If the Canada Southern stock is taken at the 55 per cent. price (as stated by no one but Mr. Cox) which is less than 2-3 of its market value (and still leaving out the unfunded debt and the other stocks in the hands of the public) the computation would amount to upwards of 52 millions, as follows:

Market value of bonds	$46,357,400
Michigan Central stock at 115	21,548,700
Canada Southern stock, $15,000,000 at 55 cents	8,250,000
Total	$76,156,100
Michigan proportion (68.562 per cent.)	52,214,145

The State Board assessment in question is but about 86 per cent. of this amount.

b. **The Method of Computation of Final Net Surplus.**

Prof. Johnson, the only witness for appellant, who attempted to make any computation of railroad values, made a computation upon the inventory method, supplemented by capitalization of final net surplus, known as the Adams Plan. As before stated, Prof. Johnson approved the plan in principle. By his computation the value of the Michigan portion of the system was reached at $46,379,384 (R. p. 671) which is but slightly in excess of the State Board assessment of 1902.

His method of computation differed from that of Prof. Adams, **first,** in taking as the physical annuity rate **4½ per cent. plus** the average Michigan **taxation** rate; **second,** taking a **ten year** period for net earnings instead of five years; **third,** capitalizing the net surplus at **6 per cent. plus** the average Michigan **tax rate; fourth,** rejecting from physical values cash and current assets. (R. p. 674.) He recognized that a portion at least of the large amounts paid from operating expenses on account of betterments and additions were plainly not chargeable to operating expenses and thereby increased the net earnings to some extent. (R. p. 671.) He attempted to justify leaving the remaining items in operating expense, not upon the ground that their inclusion was necessary to keep up the road to its normal condition from year to year, but that in order to "keep abreast of technical development" in railway transportation it was necessary to increase the cost and value of equipment of all kinds. He admitted, however, that a large amount of the expenditures which he left in operating expenses increased not only the gross earnings, but the net earnings of the road, and that the effect of these additions and betterments in increasing net earnings would be permanent. (R. pp. 676-77.)

As otherwise stated by him, the method which he adopted resulted in distributing less per cent. profit to stockholders in order to strengthen future capacity and actual future net earnings of the property. He expersly admitted that the result of this system of increasing the cost and value of equipment for the purpose of "keeping abreast of technical development" had been (aside from panic years) a steady increase in net income from operation of railroads. (R. pp. 677-8.)

We submit that in each of the four respects in which Prof. Johnson's basis of computation differs from that of Prof. Adams, it is too favorable to appellant.

(1.) **The rate of capitalization.** It is shown beyond dispute that the net return to the investor in appellant's stock

and bonds during the period taken was not more than 3½ per cent. on bonds and 5 per cent. on stock. That the return which the investor is willing to accept furnishes a fair basis for capitalizing that which represents the bond value and stock value respectively, seems clear. These were the rates taken by Prof. Adams for a return upon physical and non-physical, respectively, the former being represented by the bonds (greatly less in amount than the physical value), the latter by the stock.

Prof. Johnson increases the average yield to bond and stock investors respectively by taking a ten year period instead of a five year period, as taken by Prof. Adams. He thus shows an average yield to investors in bonds for the entire ten year period, of 3.894 per cent., and upon stock of 4.02 per cent. Yet he took capitalization rates of 4½ per cent. and 6 per cent. (in addition to the Michigan tax rate), which we submit is extravagantly in excess of even the ten year period.

Prof. Johnson admits that he is not a specialist on railway finance or taxation, and that he has given no unusual amount of study to problems of finance, the stock market, and railway taxation. (R. p. 672.)

Mr. Woodlock, of the Wall Street Review, as a witness for appellant, gave his judgment of a proper capitalization rate as **3½ per cent.** plus the taxes. (R. pp. 662, 663.)

The Department of Commerce and Labor has adopted the capitalization rate (on the net earnings basis) as determined by the market value of securities. (See letter of transmittal in Bulletin 21 of Department of Commerce and Labor before referred to.)

We submit that the rate of 3½ per cent. as adopted by both Prof. Adams and Editor Woodlock is fair and conservative, and that Prof. Johnson's rate of 4½ per cent. is radically excessive.

It is true that in making the Michigan Railway Appraisal of 1900 Prof. Adams used a slightly higher rate. The use of this higher rate is explained by the fact that in 1900 no attempt was made to get the entire value of the railroads. The object of the investigation was to get near enough that value to enable the Legislature to determine whether the railroads were paying the same rate of taxation as general property. The valuations were therefore made with great conservatism. In 1900 the entire value was not obtained. The effort was made to compute the value of property for 1902 as an assessor would. (R. p. 817.) Nor is there any force in the proposition that Prof. Adams made his 1902 rate a trifle smaller than he would have made it but for the fact of the inclusion in operating expenses of the large disbursements for additions and betterments. The fact remains that his computation has entirely failed to take into account the fact that the net earnings were decreased by the payment for additions and betterments from operating expenses, and nevertheless, the rate taken is no lower than that which the investor is shown to have been willing to accept.

(2.) **Adding the Tax to Interest Rate.** Complainant introduced testimony that a considerable part of the Michigan Central bonds are held by savings banks or other investors who, for one reason or another, escape taxation, and argue from this that the rate netted to the investor is not a fair measure of the public's valuation of the securities because one liable to taxation cannot afford to hold such low interest-bearing securities.

It is submitted that this argument is not entitled to weight. The same consideration is true as to the majority of low interest-bearing bonds issued by public service corporations of all kinds. Yet the bonds are worth every dollar they call for, for the same reason which exists in the case of the railroad bonds in question, namely, that there is an open

and free market for safe issues even at the low rates. That there was a free market for Michigan Central bonds at 3½ per cent. notwithstanding taxation, during the period in question, is expressly stated by Editor Woodlock of the Wall Street Review (R. p. 662.) Property is properly taxable on what it is worth in the market, even though all people would not care to buy it at the given price. Indeed, market value is the test of taxation value.

An attempt was made to show that some of the Michigan Central bonds were held by savings banks and others not taxable thereon, but the showing was limited to $2,370,000 out of a total outstanding issue of over $43,000,000. (R. p. 645.)

Appellant showed that the majority of the Michigan Central stock transferred during the year ending August 15, 1902, was transferred to brokers (R. pp. 644-49), but the transfers showed numerous sales to others than brokers, including Mr. Lisman, and including among the brokers Mr. Wildes and Messrs. Seligman & Co.

It clearly appears that the fact that railway securities are taxable in some jurisdictions, does not appreciably affect the market. Mr. Greene says, "The individuals do not figure the taxes." (R. p. 559.) Mr. Wildes says, "Holders of coupon bonds do not expect to pay the tax," although registered bonds are sold at a less price than coupon bonds on account of taxation. (R. p. 574.)

It would seem from the record that less than 3½ millions of the Michigan Central bonds are registered (R. p. 645) out of a total of over 37 millions of first mortgage bonds in the hands of the general public.

Mr. Lisman says that "as a rule bonds very seldom pay taxes" (R. p. 569.) Editor Woodlock says, "There is always a large class of investors to whom taxation presents no terrors. A great many non-residents of New York, I know from

my financial business, do not pay taxes on such bonds." (R. p. 661.)

In New York stocks are not taxed at all, while in several of the states the tax on stocks and bonds is at an almost insignificant rate. (R. p. 569.)

The whole objection seems to be covered by the statement of Mr. Woodlock, that "People who expected to be taxed on their incomes and could not escape by ordinary methods, would not buy that kind of bonds." (R. p. 660.)

But the undisputed fact remains that the liability to taxation has not interfered with the market on stocks and bonds of the high grade of appellant's.

The fact that the taxes for 1902 were not paid out of the earnings for that year, but out of the earnings for 1903 (Greene, R. p. 561; Johnson, R. p. 675) is evidence that the value of appellant's railroad properties in 1902 could not have been appreciably affected by the tax law in question.

Prof. Adams gives the following reasons, which seem to us conclusive, against the propriety of taking the tax paid by the investor into account:

He says, first, there is no evidence warranting the conclusion that the cash value of Michigan railroad properties as measured by the market quotations of securities was less on April 14, 1902, than it would have been had the **ad valorem** tax law in question not been passed; second, that Michigan contributed her full share to railway construction during 1902, thus showing that investors in Michigan railway properties were not affected by fear of increased taxation, there being no evidence of a depressing influence on account of the tax law in question, an assessment should not anticipate results that may not (and indeed probably will not) be effected in the future; third, to reduce the values of railway properties to an amount obtained by adding the increased tax rate to an interest capitalization rate, would be to treat railway properties dif-

ferently from the manner in which general property is assessed, for the local assessor does not decrease values of general property until increased taxation has actually decreased the value,—one of the purposes of an annual appraisal is to make assessments conform to changing commercial conditions; fourth, the method of valuation upon the plan of inventory, represented by capitalization of final net surplus producing the non-physical value, makes no allowance for speculative or anticipated values, and thus should not be burdened with anticipated deductions in value; fifth, experience shows that increased expenses of any kind are usually met by efforts either to raise the price of the service or to economize the cost in other directions; and that in view of the history of railway development no one can safely say how an increased tax will show itself in the economies of railway administration; sixth, that as the tax law in question does not burden railroad property more greatly than general taxes burden general property, there is no inducement for investors in the former class of properties to sell their investments at reduced price. The correct comparison lies between an investment in railway property after an increased tax, and an investment in other form of property. Michigan railroads having paid less taxes per mile of line than were paid by railways of adjacent states, and in general less than those of the United States, previous to 1901, an increased tax would not exert any considerable influence on the property's valuation.

We submit that there is no reasonable basis for adding to the capitalization rate the tax paid by any investor. Surely the Michigan rate of taxation could not be so taken into account unless the holders of the securities paid the Michigan rate. There is no evidence that any considerable portion (if any at all) of appellant's bonds are generally held in Michigan. The affirmative evidence is that practically the entire

of appellant's stocks are held in New York, where they are not taxable at all.

(3.) **The period over which an average for net earnings should be taken.**

Prof. Johnson took a ten year period. This long period was evidently taken in order to embrace the full five panic years from 1893 to 1898. The five year period from 1897 to 1902 taken by Prof. Adams includes two of the panic years. Prof. Johnson admits that he has no personal experience and can cite no precedent for taking a ten year period, and that his adoption of that period is purely theoretical. (R. p. 674.) Appellant produced no other witness on the subject whose testimony is entitled to great weight. Mr. Russell, Mr. Hance, Mr. Newberry and Mr. Walbridge, who are all, or nearly all, business associates of the general attorney and president of the appellant railroad (R. pp. 691, 694), in giving their views of a proper capitalization rate on the net earnings method, state that they think a ten year period for reaching the average rate for such purpose is proper (Mr. Walbridge giving his opinion at 20 years.) They admit that they have had no experience with railway finance, or railway earnings capitalization. (R. pp. 692, 695.) Mr. Newberry expressly says that he takes the ten year period for the very purpose of covering five full panic years. (R. p. 697.)

On the other hand, Mr. Greene says that his experience has shown that "five years previous to 1902 would be a fair average for ascertaining the intangible value of Michigan railroads." (R. p. 554.)

Prof. Adams says, "I came to the conclusion that less than five years was the practice among business men." (R. p. 510.)

Prof. Adams significantly says: "The error in taking a ten year period, including the lean years in the past, and practically taking out of the earnings of five previous years

enough to enable the road to recoup itself for what it might have lost, and in addition to that, to take out of the current earnings an amount to provide against lean years in the future, in reality burdens the five years' prosperous period with two lean periods, and practically, so far as the result is concerned, would be taking a fifteen year period. If each decade has lean and fat periods the fat had ought to be burdened with only one lean period." (R. p. 804.)

As before mentioned, the Department of Commerce and Labor in making its commercial valuation of railway operating properties for 1904, adopted a period of five years previous to June 30th of that year, for obtaining the average net earnings to be capitalized. (Bulletin No. 21, Dept. of Commerce and Labor, p. 20.)

A period of five years previous to, and including 1902, is even more favorable to the appellant railroad, as that period included a portion of the panic period.

There is manifestly no reason for taking the earnings of more than one year provided those earnings were absolutely stable. It is only for the purpose of ascertaining a stable earning that more than one year is inquired into. The tables of Michigan Central earnings, both gross and net, show their remarkable stability. The reports also show that although prosperity is occasionally interrupted by a panic period, a given number of years succeeding the panic show greater prosperity than the same number preceding. In other words, railroad prosperity progressively increases, and thus a period of five successive years at any time produces a fair average. This progressive increase (and thus the comparatively slight difference resulting from the taking of a five or ten year period) appears by the table presented by Prof. Johnson on page 671 of the record.

In the following cases a capitalization of the net earnings of one year was approved:

State vs. Nev. Central R. R. Co., 69 Pac. 294.
Louisville Ry. Co. vs. Commonwealth, 49 S. W. 486.

We submit that a five year period is eminently fair toward appellant.

(4.) **Keeping abreast of technical development.** To overcome in part the effect of the showing that the apparent net earnings of the Michigan Central Railroad had been decreased by the practice of charging betterments and additions to operating expense, appellant introduced testimony designed to show that some of these betterment and addition charges were properly payable as operating expenses. This testimony is material as respects the computation made by Prof. Adams only so far as it affects the question of what is a proper capitalization rate, because Prof. Adams took the net earnings as **actually reported by appellant** after paying from operating expenses the additions and betterments referred to. The only materiality such testimony otherwise has (apart from the general effect upon the dividend earning capacity of the road) relates to the computation by Prof. Johnson (appellant's expert witness) who attempted to correct and increase the net earnings as reported, by rejecting from operating expense a portion of the betterments and additions.

Prof. Johnson, as the result of the corrections made, shows the average net earnings over a ten year period, of the Michigan portion of the system, before the payment of taxes, $2,923,856.98 (R. p. 671). The average annual net earnings of the Michigan portion of the system, over the five year period from 1898 to 1902 inclusive, before the payment of taxes, would be $3,056,706.14. The testimony of Prof. Johnson and of Messrs. Woodlock, Cox and Marwick is designed to support the general conclusion referred to.

We submit that if appellant's actual net earnings are to be considered, all the sums before referred to in this brief

as reported by the Michigan Central Railroad Co. as paid from operating expense on account of betterments and additions, should be rejected from that account. The reasons given for leaving a portion of such items in operating expense are not satisfactory. They are based upon the proposition that the road should be permitted to accumulate a surplus. Thus, Prof. Johnson says: "The result of the system followed by the Michigan Central in that regard is to give a better and more economical service; the earning capacity of the Michigan Central is favorably affected by betterments which have been included in operating expenses and the economies resulting therefrom; during the last five years it has been on the up grade. Its increased prosperity and earnings are due in a large part to improvements which have been paid for out of operating expenses. You add to value of the property in fat seasons, creating a surplus, as a bank does out of its earnings in good times. Every railroad has to prepare for periods of depression." (R. p. 677.)

And again: "While both the train load and the earnings have been favorably affected during the last few years because of the large volume of traffic, they are none the less due to improvements in track, equipment and management, whose influence on earnings will be permanent. * * * I have found it to be a fact for a number of years past that profits to stockholders have been restricted in order to strengthen future earning capacity and earning of the property." (R. p. 677.)

And again: "The result, aside from the panic years, has been a steady increase in the net income from operation." (R. p. 678 and Table.)

Treasurer Cox says of the appellant railroad: "It has been increasing the net earnings notwithstanding the practice of charging to operating expenses the class of betterments mentioned, and has had a steady increase in growth." (R. p. 658.)

It is, we submit, clearly shown that the betterments and additions referred to have no place in an operating expense account. It appears by the record that the Michigan Central road uses the Interstate Commerce Commission's classification of expenses. (Auditor Burt's Test., R. p. 492.)

Prof. Adams says, speaking of this classification: "The word 'depreciation' does not occur in railway reports to the Interstate Commerce Commission. It is covered by the phrase 'renewals and repairs' in the official classification. I know of no better source or guide for determining theoretically depreciation or cause of renewals, than the Interstate Commerce Commission's statistics." (R. p. 807.)

And again: "The object of a depreciation account is to collect a fund during the life of a given piece of property so that when it is worn out, either the original cost, or a new bit of property can be restored to the investor, and any adjustment of accounts or theory of expenditure by means of which that is done may be said to include in it a provision for depreciation." (R. p. 806.)

And again, speaking of Prof. Johnson's attempted correction of net earnings: "I understand the general result to be that the schedule of betterments is an amount which was put into betterments after taking care of depreciation and renewals which naturally come in the operating expense account." (R. p. 806.)

And again: "Adding improvements to keep the property abreast of technical development results in burdening the earnings of that year with expenses more or less permanent in character, which does not seem to be in harmony with the true definition of net income. * * * It would be difficult to find any of these improvements known as technical development, which do not result either directly or indirectly, in financial advantage and increased return." (R. p. 803.)

As before shown in this brief (p. 108) it appears by the undisputed testimony that the operating expense of the Michigan Central Railroad during a full ten year period, including 1902, after taking out the items of betterments and additions contained in Auditor's clerk Comstock's schedules, was still several per cent. higher than the average operating expense of railroads in the United States, and substantially larger than the average of the Michigan group of railroads. (Prof. Cooley's Table, R. p. 819.)

Mr. Marwick attempted to show that without including in operating expense a part of the betterment and addition items, the road could not have been maintained to proper efficiency. He attempted to justify this statement by saying that the Michigan Central expenditures from operating expense (aside from additions and betterments) on account of engines, freight cars and passenger cars, was inadequate as shown by railway experience. (R. p. 652.)

The record contains a series of tables compiled by Engineer Hinchman from the Interstate Commerce Commission's statistics, showing the cost of maintaining the three kinds of equipment mentioned as compared with the Michigan Central's expense therefor as reported to the Railway Commissioner, and showing the following results:

	Hinchman's Table Average U. S. for 10 years.	Marwick's Figures M. C. average 10 years.
Locomotives	$14.09	$15.41
Passenger cars.....	5.38	5.18
Freight cars.....	44.60	62.30

(R. pp. 652, 822-824.)

It thus appears that the Michigan Central average payments for locomotives and freight cars is largely in excess of the average for the United States, the passenger cars alone being smaller than the average. As there were 12 to 13 thou-

sand fright cars purchased per year as compared with 3 or 4 hundred passenger cars, the Michigan Central average payment on account of all classes of equipment is very much larger than the average in the United States.

This evidence, we submit, thoroughly overcomes the theoretical proposition of Mr. Marwick (in which he is not supported by the definite testimony of any officer or employee of the Michigan Central Railroad) that the road could not have been properly kept up to a normal standard without the betterments and additions referred to.

As a matter of financial management, no criticism is intended upon the justice or propriety of paying for improvements out of current earnings before paying dividends. But when such payments increase the value and the net earning capacity of the property so improved, such increase is subject to taxation, whether the cost thereof is charged to operating expense or to an improvement account.

We submit that Prof. Adams' computation of the value of the appellant railroad properties which took the average net earnings over a five year period as **actually reported** by the Michigan Central Railroad, after the payment of **taxes actually paid** by that road, using capitalization rates of 3½ per cent. and 5 per cent. respectively (by which the value of $63,890,211 was shown) is conservative.

If, however, the average net earnings over a five year period, namely: $3,056,706.14, are taken, and rates of 4 per cent. and 5 per cent. respectively adopted,—which are higher than the rates of 3.89 per cent. and 4.02 per cent. found by Prof. Johnson to be the average rates of return to investors in the stock and bonds respectively, of the Michigan Central, **over a ten year period,**—the result would be a valuation of $52,900,979, of which the State Board 45 million dollar assessment is but 85 per cent. This computation would be as follows:

Average net earnings before payment of taxes..	$ 3,056,706 14
5.65 per cent. (4 per cent. interest plus 1.65 per. cent. taxes) $46,111,011 physical valuation....	2,605,272 21
Net remainder for capitalization.....	$ 451,433 93
Capitalizing net remainder at 6.65 per cent. (5 per cent. interest plus 1.65 per cent. taxes)...	6,789,968 87
Physical valuation	46,111,011 00
Total valuation Michigan portion.....	$52,900,979 87

If a ten year period for net earnings were taken and the capitalization rates adopted at 4 per cent. plus the Michigan tax rate for 1902, and at 5 per cent. plus the tax, the entire betterments and additions referred to being deducted from the expense account, the value of appellant's railroad properties would be over $59,000,000, the assessed valuation being but 76 per cent. of this amount.

Even if Prof. Johnson's extreme capitalization rates were adopted (4½ per cent. and 6 per cent. plus taxes) including his ten year period of net earnings, the betterments and additions being taken from operating expense as they should be, the value of appellant's railroad properties would be more than 51 millions, of which the assessed valuation is but 87 per cent.

The **Grosscup Rule** is not a reliable authority for capitalizing a steam road like the Michigan Central at the high market rate of 6 per cent. plus taxes. Both Mr. Greene and Prof. Adams have pointed out the difference between the case of the Union Traction Co. and a steam road like the Michigan Central. (R. pp. 562, 500.)

c. **The Net Earnings Method.** The testimony of Messrs. Russell, Hance, Newberry and Walbridge that rates varying in the judgments of the respective witnesses from 6 per cent. to 10 per cent. should be used for capitalizing the net earnings

of a railroad, after taxes had been deducted from such net earnings, is, we submit, entirely too radical.

None of these witnesses has had any experience whatever with financing railroads, except as Messrs. Hance and Newberry were connected with the underwriting of the bonds of a logging road fifty miles long in the upper peninsula of Michigan so heavily bonded (as the timber is cut off) that a sinking fund had to be provided to meet the bonds (R. pp. 694, 696), and except as Mr. Newberry also took part in the underwriting of another railroad so heavily bonded that all there was of saleable value was the bonds (a sinking fund being required for this also), upon which it defaulted, resulting in a foreclosure of the mortgage. (R. p. 696.)

We submit that these experiences furnish no criterion for determining the capitalization value of a prosperous road of the highest class, with not simply stable but constantly increasing net returns.

Mr. Russell as a banker admits that a railroad stock yielding 4 per cent. dividends is easily as good as a 4 per cent. bank stock for purposes of collateral; that a railroad stock could even earn 4 per cent. less than bank stock and still be worth par; that the net return to the investor in Michigan Central bonds for 1901 and 1902 was only about 3½ per cent., yet he as a banker bought bonds at that rate in both those years as investments for his bank. (R. pp. 691-3.)

Mr. Hance as trust officer of a Detroit trust company, bought Michigan Central 3½'s in 1902 at par, and admits that Detroit bank stocks which Mr. Russell says at a given earning rate are worth less than first class railroad stocks, are sold at prices which net the investor only about 3 per cent. above taxation. (R. pp. 694-5.)

We submit that this testimony as to the high rate demanded for capitalization of net earnings of a prosperous railroad cannot be seriously considered.

We submit that the capitalization rate of 4 per cent., being more than the amount netted to the investor in Michigan Central bonds and stocks over even a period of ten years is, in the case of this road, a safe capitalization rate.

If, however, the entire earnings should be taken for a ten year period after the payment of taxes, and correcting the earnings by the betterments and additions referred to, the value of the Michigan portion of appellant's railroad property would be about 60 millions, as follows:

Net earnings for 10 year period as reported by appellant before taxes paid (R. p. 671)	$40,004,099 00
Taxes paid (R. p. 819)	3,999,980 00
Net earnings after taxes paid	36,004,119 00
Betterments during ten year period (R. p. 819)	7,788,847 00
Total corrected net earnings after taxes paid, for ten year period	43,792,966 00
Average for one year	4,379,296 60
Michigan proportion (68.562 per cent.)	3,002,533 00

This, capitalized at 5 per cent., yields approximately 60 millions.

If a five year period for average earnings is taken, the capitalization is somewhat higher.

It is not without interest to note that the Department of Commerce and Labor fixed 4.09 per cent. as the capitalization rate for the Michigan Central Railroad Company in 1904. (Bulletin No. 21, p. 38). A capitalization at this rate of merely the $2,503,345 average earnings for the five year period, as actually reported by the Michigan Central Railroad Company after the payment for betterments and additions referred to, would amount to more than $60,000,000.

We submit it clearly appears from the foregoing discussion, **first**, that the appellant has failed in its contention that the general properties of the state were substantially undervalued in the 1902 assessment; and second, that appellant's

railroad properties were under-valued in the 1902 railroad assessment to fully as great an extent as the claimed under-valuation of general properties.

We respectfully ask that the decree of the Circuit Court as to appellant, Michigan Central R. R. Co., be affirmed.

THE RAILROADS OTHER THAN THE MICHIGAN CENTRAL.

(Nos. 461-487, inclusive.)

The list of the titles of these cases is given in Mr. Wykes' brief at pages 11-12.

In the case of none of these roads does the defendant claim any fraudulent under-valuation.

As to the Chicago, Milwaukee & St. Paul, the Chicago & Northwestern, the Copper Range, the Escanaba & Lake Superior, the Gogebic & Montreal River, the Lake Superior & Ishpeming, the Lake Shore System, the Marquette & Southeastern, the Mineral Range System and the Munising Railroad, Prof. Adams did not disturb the valuations adopted by the State Board of Assessors. The reasons for not departing from such State Board valuations are various. (R. pp. 542-551.) In the case of the Grand Trunk group Prof. Adams' valuation was slightly less than the State Board assessment. (Table "739a" following p. 554 of the Record.)

Actual under-valuation in the 1902 State Board assessment is thus claimed as to the following roads,—in addition to the Michigan Central and to the Pere Marquette (which has not appealed)—viz., Ann Arbor, Detroit & Mackinaw, Duluth, South Shore & Atlantic, Grand Rapids & Indiana System, Manistee & Northeastern, Minneapolis, St. Paul & Sault Ste. Marie, Pontiac, Oxford & Northern, and Sault Ste. Marie Bridge Company.

Proof of such under-valuation is confined to the Cooley and Adams appraisal, both physical and non-physical, for 1902, except so far as corroborating evidence may be found by comparison with the 1900 Michigan Railway appraisal. (Table "739a," following page 544 of the Record.)

The record does not show the amount of net earnings, nor the stock and bond values in the case of either of these roads, but does show, first, the Cooley physical appraisal of 1902; second, the rates adopted by Prof. Adams for the 1902 valuation—both for annuity on physical values and for the capitalization of the final net surplus—and, third, the total value—physical and non-physical—as found by Prof. Adams.

The following table shows the data referred to in the case of each of the roads affected by this branch of the discussion:

	1903 State Board Assessment.	1902 Cooley Physical Appraisal.	1902 Adams' Capitalization Rates.	1902 Value as Given by Adams.
Ann Arbor System....	$ 7,582,000	$ 7,548,315	4.25 and 6 per cent.	$ 7,640,282
Detroit & Mackinaw..	4,100,000	4,113,347	4.5 and 6 per cent.	4,348,247
D., S. S. & A.....	12,500,000	9,553,688	5 and 7 per cent.	13,606,588
G. R. & I.....	11,500,000	11,796,732	4.5 and 6 per cent.	12,670,615
M. & N. E.....	1,500,000	1,423,125	5 and 8 per cent.	1,714,900
M., St P. & S. S. M..	5,100,000	5,017,253	4.5 and 6 per cent.	7,960,286
P. O. & N.....	1,000,000	1,126,089	6 and 7 per cent.	1,488,046
S. S. M. Bridge Co....	400,000	329,178	4 and 4 per cent.	530,285

If general property under-valuation shall be found established, we respectfully submit that the valuations of the railway properties of the roads above referred to should be accepted as found by Prof. Adams.

We submit that the decree of the Circuit Court should be affirmed as to all of the appellants.

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Witnesses.

II.
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For Defendant:

Witnesses.